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# SUPREME COURT

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No. 10-1540

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| Title | David Bobby, Warden, Petitioner<br>v.<br>Archie Dixon |
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| Lower Ct. | United States Court of Appeals for the Sixth Circuit |
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| Jun 20 2011 | Appendix of David Bobby, Warden filed |
| Jul 21 2011 | Brief of respondent Archie Dixon in opposition filed |
| Jul 21 2011 | Motion for leave to proceed in forma pauperis filed by respondent |
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# PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

AND
BRIEFS

No. 10-1540

JUN 20 2011
OFFICE OF THE CLERK

# In the Supreme Court of the United States

DAVID BOBBY, Warden,

*Petitioner,*

v.

ARCHIE DIXON,

*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE—NO EXECUTION DATE SET

## QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it abandoned the "in custody" requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981)?

2. Under the clearly established law of *Oregon v. Elstad*, 470 U.S. 298 (1985), does the interviewer's state of mind have any bearing on whether a suspect's statement is voluntary?

3. Did the Sixth Circuit exceed its authority under AEDPA when it condemned the use of the "prisoner's dilemma"—where the police indicate that favorable treatment will go to the first suspect who cooperates—as an unconstitutionally coercive interrogation tactic?

## LIST OF PARTIES

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Marc C. Houk. See Fed. R. Civ. P. 25(d).

The Respondent is Archie Dixon, an inmate at the Ohio State Penitentiary.

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## PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of David Bobby, Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The Sixth Circuit's opinion, *Dixon v. Houk*, 627 F.3d 553 (6th Cir. 2010), is reproduced at App. 4a. The Sixth Circuit's order granting en banc rehearing is reproduced at App. 2a, and its order reinstating the panel opinion is reproduced at App. 1a. The United States District Court for the Northern District of Ohio's opinion is reproduced at App. 44a. The Ohio Supreme Court's opinion on direct appeal, *State v. Dixon*, 805 N.E.2d 1042 (2004), is reproduced at App. 116a.

## JURISDICTIONAL STATEMENT

The Sixth Circuit vacated its order granting the Warden's petition for rehearing en banc on April 6, 2011. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Section 2254(d) of Title 28 of the United States Code, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## INTRODUCTION

On November 9, 1993, detectives twice questioned Respondent Archie Dixon about the disappearance of his former roommate. At the morning encounter, detectives failed to give *Miranda* warnings. But they also did not get anywhere with their questions; Dixon denied any knowledge of his roommate's whereabouts. Several hours later, detectives dug up a body. At an evening interview, after detectives issued two sets of *Miranda* warnings, Dixon confessed that he and an accomplice violently attacked his roommate and then buried him alive.

The Ohio Supreme Court conducted a faultless analysis of the confession's admissibility under *Oregon v. Elstad*, 470 U.S. 298 (1985): Dixon's initial (unwarned) encounter with detectives, though in violation of *Miranda*, was voluntary; and his statements at the later (warned) session were voluntary. Given "the[se] surrounding circumstances and the entire course of police conduct," the state court concluded that Dixon's confession was "voluntarily made" and, thus, admissible under *Elstad*, 470 U.S. at 318.

In overturning that judgment, the Sixth Circuit mangled three blackletter rules of criminal procedure. First, the court stated that Dixon had invoked his *Miranda* rights during a prior conversation with police on November 4, and that *Edwards v. Arizona*, 451 U.S. 477 (1981), prohibited any questioning on November 9. But the *Edwards* bar does not apply because Dixon was not "in custody" during that previous meeting with police.

Second, the Sixth Circuit complained that detectives deliberately withheld *Miranda* warnings at the first interview on November 9. But an officer's state of mind is irrelevant to whether *a suspect's statement* "is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309.

Third, the Sixth Circuit held that detectives coerced Dixon's statements by inviting him to "cut a deal" before his accomplice—a classic "prisoner's dilemma." The State is aware of no authority condemning this interrogation method as unconstitutionally coercive.

Each holding defies well-established precedent from this Court, creates stark divisions of authority among the circuit courts, and ignores the deferential nature of federal habeas review under AEDPA. For these reasons, this Court should grant the Warden's petition and reverse the Sixth Circuit's judgment.

## STATEMENT OF THE CASE

### A. Dixon violently attacked his former roommate and buried him alive.

In the early morning hours of September 22, 1993, Dixon and his two former roommates—Timothy Hoffner and Christopher Hammer—traveled to the Toledo home of Dixon's girlfriend, Kirsten Wilkerson. Once there, Dixon and Hoffner attacked Hammer. Hoffner tried to break Hammer's neck while Dixon struck him with a wine bottle—all while Hammer begged them to stop. Dixon and Hoffner then tied Hammer to a ladder, emptied his wallet, and seized his birth certificate and social security card. App. 117a.

Dixon, Hoffner, and Wilkerson drove Hammer to a wooded area. Dixon and Hoffner then gagged and blindfolded Hammer, tied his hands and feet behind his back, and pushed him into a freshly dug grave. After smoking a cigarette and saying a prayer, they buried Hammer alive. Dixon and Hoffner then walked across the grave to pack down the dirt. App. 117a-118a.

An autopsy report concluded that Hammer "remained conscious during the first two to three minutes" after being buried alive. App. 119a. "[W]ithin eight minutes," he "died of asphyxia." *Id.*

### B. After police located the victim's body, Dixon confessed to the murder.

On September 25, 1993, Dixon obtained a state identification card bearing his photograph and Hammer's name. Five days later, he secured a duplicate certificate of title to Hammer's Dodge Daytona, and sold the car for $2,800. App. 118a.

About a month later, on November 1, a police officer stopped Dixon for a traffic violation. After discovering that Dixon lacked driving privileges, the officer impounded the car. An inventory search uncovered the identification card with Hammer's name and Dixon's photograph. App. 118a.

On November 4, as part of the investigation into Hammer's disappearance, Detective Ron Scanlon traveled to the Sylvania Township Police Department to meet Detective Vern Snow. App. 121a. By happenstance, Dixon walked into the station around the same time and attempted to claim his impounded car. *Id.* Scanlon and Snow sought to question Dixon about Hammer's disappearance.

Although Dixon was not under arrest or in custody, Scanlon issued *Miranda* warnings. *Id.* Dixon then indicated that he wanted to speak first with his attorney. The detectives immediately ceased their questioning and Dixon left the station. *Id.*

By November 8, police had located Hammer's Dodge Daytona at a used car lot and identified Dixon as the prime suspect in the transaction. App. 118a.

On the morning of November 9, police arrested Dixon on forgery charges. Around 11:30 a.m., Detective Snow and Detective Phil Kulakoski interviewed Dixon at the Toledo Police Department.[1] App. 121a. Although Dixon was in custody, the detectives deliberately chose to withhold *Miranda* warnings because they "believed that Dixon would invoke his right to counsel if he were issued *Miranda* warnings." *Id.* In response to their questions, "Dixon made incriminating statements regarding only the forgery charge," and "[h]e denied all knowledge of Hammer's disappearance." App. 121a-122a. The entire interview "lasted only about 45 minutes." App. 121a. At 3:30 p.m., police transported Dixon to the county jail.

Also on November 9, Detective Robert Leiter and another officer encountered Hoffner while executing a search warrant at Kirsten Wilkerson's home. Hoffner "made statements implicating Dixon" and "led police to [Hammer's] gravesite." *State v. Hoffner*, 811 N.E.2d 48, 52 (Ohio 2004). Around 3:30 p.m. that afternoon, Hoffner waived his *Miranda* rights and gave a taped statement fingering Dixon in

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[1] The interview transcript, which erroneously identifies Detective Scanlon as a participant, is reproduced at App. 156a.

Hammer's murder. *Id.* Detectives then released Hoffner from custody.

Around 7:30 p.m., Detective Kulakoski and Detective Leiter picked Dixon up from the jail and transported him back to the Toledo Police Department. App. 122a. Before any questioning, Dixon indicated that "he had heard that police had found a body and asked whether Hoffner was in custody." *Id.* Dixon further stated that he had spoken to an attorney and was willing to discuss what happened. *Id.*

The detectives read *Miranda* rights to Dixon. *Id.* Dixon then signed a waiver form (dated November 9, 1993, at 7:30 p.m.) indicating that he was "willing to answer questions and make a statement," and that he "d[id] not want a lawyer at this time." App. 189a. Dixon made an initial statement, and detectives set up a tape recorder.

Around 8:00 p.m., with the tape recorder running, Detective Kulakoski again advised Dixon of his *Miranda* rights. App. 191a. He further confirmed the validity of Dixon's signature on the waiver form. App. 192a. Dixon then confessed to murdering Hammer with Hoffner's assistance. App.196a-205a.

### C. A jury convicted Dixon of murder and recommended a death sentence.

A grand jury indicted Dixon for aggravated murder, kidnapping, and aggravated robbery. App. 119a. Dixon then filed a motion to suppress his confession. The trial court suppressed Dixon's first November 9 statement without objection from the State. App. 122a. But the trial court also

suppressed the second statement on the ground that detectives deliberately withheld *Miranda* warnings during the first encounter on November 9. That error, the court said, tainted the admissibility of Dixon's confession at the second encounter under *Wong Sun v. United States*, 371 U.S. 471 (1963).

On interlocutory appeal, the Ohio court of appeals reversed: The detectives' decision to withhold *Miranda* warnings to Dixon at the first encounter, the court found, "d[id] not . . . reach[] so far as to taint [his] later *Mirandized* statements." *State v. Dixon*, 656 N.E.2d 1, 4 (Ohio Ct. App. 1995).

At trial, the State introduced Dixon's confession from the second November 9 interview. The jury found Dixon guilty on all charges. It later recommended a death sentence, which the trial court imposed. App. 120a.

### D. The Ohio Supreme Court affirmed Dixon's conviction and sentence.

On direct appeal, the Ohio Supreme Court determined that Dixon's confession was admissible: "[I]f a suspect's statement obtained in violation of *Miranda* is nevertheless voluntary, the Fifth Amendment does not require the suppression of a subsequent confession made after a suspect has been fully advised of and has properly waived *Miranda* rights." App. 123a (citing *Oregon v. Elstad*, 470 U.S. 298, 318 (1985)).

The Ohio Supreme Court concluded that Dixon's first encounter with police on November 9, "though technically obtained in violation of *Miranda*, had been voluntary." *Id.* The court observed that "detectives did not threaten Dixon," that they gave

him "several breaks during the interview," App. 124a, and that Dixon "indicated his awareness of his rights during [the] session," App. 126a.

The Ohio Supreme Court found Dixon's second statement voluntary as well: Dixon received *Miranda* warnings, signed a waiver, expressed his willingness to discuss Hammer's disappearance, and remained calm at all times. App. 127a. Furthermore, the court indicated that the earlier unwarned session "did not affect the voluntariness of [this] session." App. 126a. Because "Dixon [previously] denied all knowledge of Hammer's disappearance," the court found "no nexus . . . between Dixon's unwarned statements . . . and his confession." *Id.*

In light of these findings, the Ohio Supreme Court deemed Dixon's confession admissible. After rejecting Dixon's other claims, the court affirmed his murder conviction and death sentence.

### E. The federal district court denied Dixon's habeas petition, but the Sixth Circuit reversed.

The district court denied habeas relief, observing that detectives advised Dixon of his *Miranda* rights "before he admitted to any knowledge of Hammer's disappearance," and that Dixon "had experience with the criminal justice system and knew how to invoke his *Miranda* rights." App. 63a. The initial (unwarned) interview, the court further noted, was "only . . . 45 minutes" and contained "[n]o evidence of physical punishment." App. 63a-64a. Given these facts, the court concluded "that the Ohio Supreme Court did not unreasonably

apply *Elstad*" when it found Dixon's confession voluntary and, thus, admissible.[2] App. 62a-63a.

The district court also rejected arguments that police disregarded Dixon's earlier *Miranda* invocation at the impound lot: "Since Dixon was not in custody on November 4, he could not anticipatorily invoke his *Miranda* rights to take effect at some indefinite moment in the future." App. 66a.

The Sixth Circuit reversed on three separate grounds. First, the court indicated that "Dixon had made it completely clear to the police" on November 4 "that he did not want to talk to detectives without a lawyer present." App. 10a. That invocation, the court said, foreclosed any new questioning on November 9.

Second, the Sixth Circuit stated that the Ohio Supreme Court "unreasonably applied" *Elstad* because the detectives' "deliberate, planned refusal to warn, followed by warnings" was different than "the momentary, innocent failure to warn in *Elstad*." App. 12a.

Third, the court held that detectives coerced Dixon's confession with an improper threat. App. 13a. During the first (unwarned) session on November 9, they advised Dixon that "a bus [was]

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[2] The district court also declined Dixon's invitation to apply *Missouri v. Seibert*, 542 U.S. 600 (2004), which "only governs instances where police first obtain an unwarned confession, then warn the suspect, and then obtain a repeated confession." App. 61a. "*Seibert* does not control" this case, the court said, because "Dixon never confessed to any knowledge [about Hammer's disappearance] before his warnings." *Id.*

leaving," and that "[t]he first one that gets on it is the only one that's gonna get on." App. 183a.

The Sixth Circuit granted Dixon's habeas petition and directed the State to either release or retry Dixon within 180 days. App. 14a. Judge Siler dissented, criticizing the majority's *Elstad* analysis for focusing on the detectives' motives. App. 38a.

The Sixth Circuit granted the Warden's petition for rehearing en banc. App. 2a. Three weeks later, and without explanation, the court vacated its order and reinstated the panel's decision. App. 1a.

## REASONS FOR GRANTING THE WRIT

Each of the Sixth Circuit's three holdings drastically upsets settled jurisprudence. First, Dixon's invocation of his right to counsel on November 4 did not trigger *Edwards* (and did not taint the admissibility of his later confession) because Dixon was not in custody on that date. Second, this Court has repeatedly confirmed that an officer's state of mind is irrelevant to the *Elstad* voluntariness test. Whatever the reason for the officers' failure to warn Dixon during the first encounter on November 9, that meeting had none of the hallmarks of coercion and thus did not taint Dixon's subsequent confession. Third, telling a suspect that he may want to "get on the bus" before his accomplice is nothing more than a classic prisoner's dilemma—a constitutionally permissible approach to police questioning.

The Ohio Supreme Court did everything right in this case. It examined the totality of circumstances surrounding Dixon's two November 9

interviews and concluded that his statements in both sessions were voluntary. Therefore, any taint arising from the detectives' *Miranda* error at the first meeting did not infect the second. In reaching a contrary conclusion, the Sixth Circuit abandoned the "custody" requirement of *Edwards*, distorted the voluntariness inquiry of *Elstad*, and condemned the prisoner's dilemma as unconstitutionally coercive. Because these holdings refashion well-worn rules governing the admissibility of confessions, the Court should grant certiorari.

### A. The Sixth Circuit discarded the "custody" component of *Miranda* and *Edwards*.

In granting habeas relief, the Sixth Circuit trumpeted Dixon's exchange with police on November 4: "Dixon had made it completely clear to the police that he did not want to talk to the detectives without a lawyer present." App. 10a. Thus, the court said, "the bright-line rule of *Miranda* against further interrogation by police remain[ed] in effect" on November 9. App. 11a (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)).

The Sixth Circuit's holding disregards one critical—and undisputed—fact: Dixon "was not under arrest or in custody" during this encounter. App. 121a. In fact, "he freely walked out of the station." App. 66a.

Time and again, this Court has said that *Miranda* is triggered only when two conditions—"custody" and "express questioning or its functional equivalent"—exist simultaneously. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). Because Dixon was not in custody on November 4, the "bright-line

rule of *Miranda* against further interrogation" was not triggered.

The non-custodial nature of the November 4 encounter also vitiates any *Edwards* claim. Under that decision, a suspect "is not subject to future interrogation by the authorities" if he previously "invoked his right to have counsel present during *custodial* interrogation." 451 U.S. at 484-85 (emphasis added).

In short, "the *Miranda-Edwards* regime . . . applies only in the context of custodial interrogation." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2090 (2009). "If the defendant is not in custody then those decisions do not apply." *Id.* The other circuits have expressly recognized that limitation. See, e.g., *United States v. Cook*, 599 F.3d 1208, 1215 (10th Cir. 2010); *Burket v. Angelone*, 208 F.3d 172, 197 (4th Cir. 2000); *United States v. Wyatt*, 179 F.3d 532, 535 (7th Cir. 1999); *Tukes v. Dugger*, 911 F.2d 508, 515-16 (11th Cir. 1990).

Not only did the Sixth Circuit part ways with this Court and its sister circuits, it endorsed a new practice of anticipatory *Miranda* invocations. Although the November 4 encounter was non-custodial, the Sixth Circuit found that Dixon had successfully invoked *Miranda* and *Edwards*. That determination runs headlong into *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991), where this Court found no precedent for the proposition "that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'"

At bottom, the Sixth Circuit jettisoned the "custody" requirement of *Miranda* and *Edwards*.

Now, in this circuit (and only this circuit), a suspect's invocation of his *Miranda* rights in a non-custodial setting erects a "bright-line rule . . . against further interrogation." App. 11a. That dramatic departure from precedent provides ample justification for certiorari.

### B. The Sixth Circuit improperly introduced a state-of-mind inquiry into the *Oregon v. Elstad* analysis.

The Sixth Circuit next turned its attention to the detectives' motives: Because detectives engaged in a "deliberate, planned refusal to warn" Dixon of his *Miranda* rights at the first session on November 9, the court held that Dixon's confession at the second (warned) session was tainted under *Elstad*. App.12a.

Again, the Sixth Circuit disregarded well-established case law. When assessing the voluntariness of a suspect's statement, the thoughts and intentions of the interviewer are irrelevant.

#### 1. The Ohio Supreme Court reasonably concluded that Dixon's confession was voluntary under *Elstad*.

In *Elstad*, officers arrested an eighteen-year-old suspect in his home for burglary. 470 U.S. at 300. One officer accompanied the suspect's mother into the kitchen to discuss the charges. The other officer remained in the living room with the arrested suspect, but did not issue *Miranda* warnings. *Id.* at 301. He asked three questions, and the suspect gave incriminating responses. *Id.* Officers then transported the suspect to the stationhouse and

issued *Miranda* warnings. The suspect gave a full statement confessing to the crime. *Id.* at 301-02. Notwithstanding the earlier *Miranda* violation, the *Elstad* Court held that the suspect's later confession was admissible.

In doing so, the Court announced a framework for determining when "an initial failure of law enforcement to administer the warnings required by *Miranda* . . . 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights." *Id.* at 300. A court first assesses whether the suspect's initial unwarned statement "though technically in violation of *Miranda*, was voluntary." *Id.* at 318. It then evaluates "whether . . . the second [warned] statement was also voluntarily made." *Id.* If the suspect spoke voluntarily at both encounters, any "taint" from the initial statement is "[n]o[t] . . . imput[ed] . . . to [the] subsequent statement[]." *Id.*

The Ohio Supreme Court hewed exactly to the *Elstad* framework. The court concluded that Dixon's "first statement, though technically obtained in violation of *Miranda*, had been voluntary": "[D]etectives did not threaten Dixon in any way, nor was there physical or verbal abuse." App. 123a, 124a. They gave him "several breaks during the interview," offering him food, drink, and the opportunity to use the restroom. App. 124a. Furthermore, the court noted, Dixon's statements

indicated that he was aware of his rights, and that he was acting on his own volition.[3] App. 126a.

The Ohio Supreme Court next found that Dixon's later (warned) statement "was knowingly and voluntarily made." *Id.* As the court observed, "Dixon initiated the conversation . . . by asking about the discovery of Hammer's body and Hoffner's whereabouts," and by "indicat[ing] his willingness to talk." App. 127a. "Police twice read *Miranda* warnings to Dixon," "Dixon . . . signed a waiver-of-rights form," and he indicated his understanding "that no deals or promises had been made in exchange for his confession." *Id.* Furthermore, "[t]he entire interview lasted approximately half an hour, there was no evidence of mistreatment, and Dixon remained calm and collected throughout." *Id.*

Finally, the Ohio Supreme Court concluded that the earlier unwarned session "did not affect the voluntariness of [this] session." App. 126a. Because "Dixon [previously] denied all knowledge of Hammer's disappearance," the state court found "no nexus . . . between Dixon's unwarned statements . . . and his confession." *Id.*

The Ohio Supreme Court's analysis is unimpeachable. The court cataloged the circumstances of each interview: the absence of any physical coercion or threats, the length of the questioning, the meeting location, Dixon's maturity and education level, and his mental condition. Cf. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)

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[3] At this first session, Dixon stated to detectives, "[E]verything I know I've already told you. I have been more than welcome to tell you." App. 126a.

(listing factors). Balancing these factors, the state high court reasonably concluded that Dixon spoke voluntarily at both sessions. Therefore, his murder confession was admissible under *Elstad*.

The Sixth Circuit should have ended its inquiry here. Because the Ohio Supreme Court conducted an objectively reasonable (indeed, perfectly faithful) application of *Elstad*, AEDPA bars habeas relief.

### 2. The detectives' state of mind is irrelevant to the *Elstad* voluntariness inquiry.

In its *Elstad* analysis, the Ohio Supreme Court attached no significance to the fact that detectives deliberately withheld *Miranda* warnings at the first meeting on November 9: "Dixon has failed to explain how the detectives' subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent."[4] App. 124a.

The state court's analysis was exactly right. This Court has repeatedly confirmed that the *officer's* state of mind is irrelevant to whether the *suspect's* decision to speak was voluntary.

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[4] The Sixth Circuit criticized this statement for "erroneously plac[ing] the burden of proof on Dixon to prove that his confession was coerced." App. 13a. The Ohio Supreme Court did nothing of the sort. The court made clear that "*the state* carrie[d] the burden of proving voluntariness by a preponderance of the evidence." App. 124a (emphasis added). It simply (and correctly) observed that evidence of the detectives' subjective intent was factually irrelevant to the inquiry.

One need only examine *Elstad*, where this Court expressed indifference as to why the officer failed to issue *Miranda* warnings before his initial questioning of the arrested suspect. The officer's omission might have been inadvertent (he was "confus[ed] as to whether the brief exchange qualified as 'custodial interrogation'") or deliberate (he was "reluctan[t] to initiate an alarming police procedure"). 470 U.S. at 315-16. "Whatever the reason for [the officer's] oversight," this Court indicated that the confession was admissible because "the incident had none of the earmarks of coercion." *Id.* at 316; accord *Missouri v. Seibert*, 542 U.S. 600, 615 (2004) (plurality) ("[T]he *Elstad* Court expressed no explicit conclusion about either officer's state of mind.").

Other lines of *Miranda* jurisprudence reinforce this principle. For instance, a suspect may waive his *Miranda* rights, so long as his waiver is knowing and voluntary. See *Davis v. United States*, 512 U.S. 452, 460-61 (1994). This voluntariness inquiry turns on the perspective of the *suspect*: "[T]he state of mind of the police is irrelevant to the question of the intelligence and voluntariness of [the suspect's] election to abandon his rights." *Moran v. Burbine*, 475 U.S. 412, 423 (1986); see also *Stansbury v. California*, 511 U.S. 318, 324 (1994) (per curiam) ("[O]ne cannot expect the person under interrogation to probe the officer's innermost thoughts.").

Finally, this Court's decision in *Seibert* confirms that the detectives' intentions are

inconsequential to the *Elstad* inquiry.[5] The *Seibert* Court confronted "a police protocol for custodial interrogation that call[ed] for giving no warnings of rights to silence and counsel until interrogation has produced a confession." 542 U.S. at 604. A fractured Court held that incriminating statements obtained after use of this protocol are presumptively inadmissible. *Id.* at 617.

"[A]t least seven members of the Court rejected an intent-based approach" to *Elstad*. *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009); accord *Seibert*, 542 U.S. at 624 (O'Connor, J., dissenting) (commending "[t]he plurality's rejection of an intent-based test"). But Justice Kennedy, casting the fifth vote in *Seibert*, concluded that an officer's intentional withholding of *Miranda* warnings is relevant in one narrow circumstance: "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

Under Justice Kennedy's analysis then, an officer's "deliberate violation of *Miranda*" is *not* enough to remove a case from the *Elstad* framework. *Id.* at 620. That occurs only if the officer uses the two-step protocol—that is, if the officer recites *Miranda* warnings "midinterrogation, after

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[5] Because the Ohio Supreme Court issued its decision two months before *Seibert*, the Sixth Circuit majority and dissent agreed "that the *Seibert* decision was not binding upon the Ohio Supreme Court." App. 36a (Siler, J., dissenting). *Seibert* nevertheless informs an interpretation of *Elstad*.

inculpatory statements have already been obtained." *Id.*

There is no dispute that detectives intentionally withheld *Miranda* warnings from Dixon during their first meeting on November 9. But they did not use the two-step protocol condemned in *Seibert*—they did not elicit incriminating statements from Dixon, recite *Miranda* warnings, and then re-elicit those same incriminating statements. Therefore, *Elstad* applies, and the detectives' motives for withholding the warnings are irrelevant.

### 3. By holding otherwise, the Sixth Circuit cemented its outlier status.

The Sixth Circuit deviated from these clear precedents, announcing that an officer's "deliberate, planned refusal to warn" is different than "the momentary, innocent failure to warn in *Elstad*." App. 12a. "[S]uch a 'police strategy adapted to undermine the *Miranda* warnings' renders the confession inadmissible." App. 10a.

In the Sixth Circuit then, the officer's state of mind is centrally important. A "deliberate, planned refusal to warn" taints a suspect's later confession, regardless of whether police deploy the impermissible two-step protocol. App. 12a. Only a "momentary, innocent failure to warn" triggers the *Elstad* voluntariness inquiry. *Id.*

No other circuit recognizes this distinction. Rather, they say, "*Elstad* sets out the general rule that the existence of a pre-warning statement does not require suppression of a post-warning statement that was knowingly and voluntarily made." *United States v. Street*, 472 F.3d 1298, 1312 (11th Cir. 2006).

But if "*Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* [is] replaced by a presumptive rule of exclusion." *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004); accord *United States v. Carter*, 489 F.3d 528, 535 (2d Cir. 2007); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005). Because detectives here did not "withhold[] *Miranda* warnings . . . until [Dixon] g[ave] a confession," *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006), these circuits would have performed a routine *Elstad* inquiry and discounted any evidence pertaining to the interviewer's subjective intent.

The divergence in approaches alone substantiates the need for this Court's review.

But a second justification exists. This Court "normally take[s] pains to avoid" "the kind of difficult, state-of-mind-inquiry" espoused by the Sixth Circuit. *Seibert*, 542 U.S. at 627 (O'Connor, J., dissenting). "[F]ocusing . . . on a police officer's subjective intent [is] an unattractive proposition"—"the inquiry will be complicated," particularly when multiple officers are involved, and "the likelihood of error will be high." *Id.* at 625-26; accord W. LaFave, Search and Seizure § 1.4(e), p. 124 (3d ed. 1996) ("[T]here is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive.").

To be sure, *Seibert* opened that door a crack. The Court authorized state-of-mind inquiries "in the infrequent case" where an officer deliberately issues *Miranda* warnings to a suspect "midinterrogation, after inculpatory statements have already been

obtained." 542 U.S. at 620, 622 (Kennedy, J., concurring in the judgment). But the Sixth Circuit has now flung the door wide open. The decision below countenances state-of-mind inquiries in every case so long as the suspect alleges a deliberate *Miranda* violation. If such a sea change in jurisprudence is to occur, it should come from this Court.

### C. The Sixth Circuit erroneously condemned "the prisoner's dilemma" as an unconstitutionally coercive tactic.

The Sixth Circuit provided a third justification for habeas relief. The Ohio Supreme Court's voluntariness finding, it said, "was based on an unreasonable determination of facts." App. 13a.

As discussed above, the Ohio Supreme Court determined that Dixon's confession was voluntary after a thorough examination of both November 9 sessions: their length, their location, Dixon's age, education, and mental condition, the absence of physical coercion or threats, and Dixon's actual responses. App. 124a-126a. The district court properly recognized this analysis for what it was—an objectively reasonable balancing of the *Schneckloth* factors. App. 63a-64a.

The Sixth Circuit disagreed. Without reviewing any of the *Schneckloth* factors, the court found that detectives coerced a confession from Dixon.

First, the Sixth Circuit stated that, at the evening interview on November 9, "detectives . . . engaged in a thirty-minute interrogation of Dixon before *Miranda* warnings were given." App. 11a.

Not so. Detectives brought Dixon into the station at 7:30 p.m., and Dixon "initiated the conversation" when he asked whether police had located Hammer's body or arrested Hoffner. App. 122a, 127a. After answering those questions, detectives issued *Miranda* warnings. Dixon then *signed a waiver-of-rights form at 7:30 p.m.*—the very start of this session. App. 189a. Only then did detectives begin their questioning, and only then did Dixon incriminate himself. Detectives then set up a tape recorder and repeated their *Miranda* warnings—at which time, Dixon offered a full confession.

Next, the Sixth Circuit focused on an isolated comment made by Detective Kulakoski near the end of the first session on November 9:

> Arch, there's one thing I want to stress with you. If something happened to Chris and you had any involvement, even though it may not have been a major role in what happened to Chris, you had any involvement now is the time to say so because if [Hoffner] starts cutting a deal over there, this is kinda like, a bus leaving. The first one that gets on it is the only one that's gonna get on. App. 183a.

This comment, the Sixth Circuit said, tainted the second session on November 9: "Holding out the promise of a 'deal' to avoid the death penalty in return for a confession . . . is a high-pressure tactic designed to override Dixon's previous five-day stand against talking. A confession given in response to such tactics is not voluntary." App. 12a.

Once more, the Sixth Circuit mischaracterized the record. When the "get on the bus" comment was uttered, this was a missing-persons investigation. (Hammer's body had not yet been located.) Because it was not yet a murder case, the court was wrong to say that detectives were trying to coerce Dixon into a confession by dangling the carrot of a life sentence in front of him. Moreover, Dixon did *not* confess in response to the comment. Quite the opposite: He said that he had "[n]othing whatsoever" to do with Hammer's disappearance. App. 186a. (Dixon confessed four hours later, after police located a body and spoke to Hoffner, and after police issued two *Miranda* warnings to Dixon.)

Even more troubling, however, was the Sixth Circuit's broad condemnation of the detective's "bus" comment as an unconstitutionally coercive interrogation device. The statement—encouraging Dixon to "get on the bus" before his accomplice—is nothing but a classic "prisoner's dilemma." This approach is effective because neither party to the crime "can[] communicate" with the other, and "each fears that the other will talk." *Page v. United States*, 884 F.2d 300, 301 (7th Cir. 1989).

The prisoner's dilemma is "rather commonplace" in police questioning "because [it is] effective and courts have held that [it is] constitutional." *United States v. Maddox*, 48 F.3d 791, 796 (4th Cir. 1995); accord *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978) ("[S]uggesting that his cohorts might leave him 'holding the bag' does not, as a matter of law, overcome a confessor's will."). Indeed, this Court has expressly "refused to find that a defendant who

confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily." *Elstad*, 470 U.S. at 317. The Sixth Circuit ignored those authorities, denounced the prisoner's dilemma as an unconstitutional "high-pressure tactic," and further drifted away from its sister jurisdictions.

As it outlawed a common method of police questioning, the Sixth Circuit ignored clear evidence in the record demonstrating that Dixon's confession was voluntary. Before confessing to Hammer's murder, Dixon affirmed—both in writing and verbally—that he was "willing to answer questions and make a statement," that he "d[id] not want a lawyer," and that he "underst[ood] and kn[ew] what [he was] doing." App. 189a, 191a-192a. Dixon also indicated that he was "making this statement of [his] own free will," that nobody "threaten[ed] [him] or promised [him] anything," and that nobody "ma[de] . . . any deals of any kind." App. 213a-214a.

Under 28 U.S.C. § 2254(d)(2), the two *Miranda* warnings, Dixon's signed waiver, and his verbal affirmations more than substantiate the Ohio Supreme Court's factual determination that Dixon's confession was knowing and voluntary. After all, "[t]he fact that a suspect chooses to speak after being informed of his rights is . . . highly probative" of voluntariness. *Elstad*, 470 U.S. at 318. To find otherwise, the Sixth Circuit had to ban a long-established (and long-approved) technique of police questioning.

* * *

The novelty of the Sixth Circuit's analysis is surpassed only by the number of precedents it ignored and the number of circuit splits it created. And the court did all this under the deferential standards of AEDPA, 28 U.S.C. § 2254(d). Given those transgressions, this Court should grant review and reverse the judgment below.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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June 20, 2011

# APPENDIX

Supreme Court, U.S.
FILED

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AND
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101540 JUN 20 2011

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

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DAVID BOBBY, Warden,

*Petitioner,*

v.

ARCHIE DIXON,

*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**APPENDIX**

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# APPENDIX A

No. 08-4019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARCHIE DIXON,

*Petitioner-Appellant,*

v.

MARC C. HOUK, Warden,

*Respondent-Appellee.*

## ORDER

The March 15, 2011, order of the court to rehear this case en banc, which had the effect of vacating the previous opinion and judgment of the three-judge panel, is hereby vacated. The effect of this order is to restore the panel opinion and order.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

## APPENDIX B

No. 08-4019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARCHIE DIXON,

*Petitioner-Appellant,*

v.

MARC C. HOUK, Warden,

*Respondent-Appellee.*

ORDER

**BEFORE: BATCHELDER, Chief Judge; MARTIN, BOGGS, MOORE, COLE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, MCKEAGUE, GRIFFIN, KETHLEDGE, WHITE, and STRANCH, Circuit Judges.**

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is

vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

## APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 10a0372p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4019

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ARCHIE DIXON,

*Petitioner-Appellant*,

v.

MARC C. HOUK, Warden,

*Respondent-Appellee*.

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 05-01290—James S. Gwin, District Judge.

Argued: August 5, 2010

Decided and Filed: December 9, 2010

Before: MERRITT, SILER, and COLE,
Circuit Judges

---

### COUNSEL

**ARGUED:** Michael J. Benza, LAW OFFICE OF MICHAEL J. BENZA, Chagrin Falls, Ohio, for Appellant. Thomas E. Madden, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for

Appellee, **ON BRIEF:** Lawrence J. Whitney, BURDON & MERLITTI, Akron, Ohio, Henry F. DeBaggis, Cleveland, Ohio, for Appellant. Thomas E. Madden, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

MERRITT, J., delivered the opinion of the court, in which COLE, J., joined. COLE, J. (pp. 9-23), delivered a separate concurring opinion. SILER, J. (pp. 24-29), delivered a separate dissenting opinion.

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## OPINION

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MERRITT, Circuit Judge. This is a coerced confession, death penalty case. On November 4, 1993, at the police station house in Toledo, Ohio, petitioner Dixon, after receiving *Miranda* warnings, advised detectives that he would not voluntarily answer their questions without a lawyer present to advise him. Notwithstanding his refusal to answer questions voluntarily, the detectives five days later devised a strategy to put pressure on Dixon to confess by questioning him, without *Miranda* warnings. The primary habeas corpus issue raised by Dixon is what effect the deliberate, planned police decision to continue the questioning but not give warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966) – a strategy that also included an offer "to cut a deal" for Dixon rather than his confederate (Hoffner) – has on the admissibility of a confession rendered four hours later when he agreed to confess.

The detective told Dixon at the end of the unwarned interrogation, "Now is the time to say so [confess] because if Tim [Hoffner] cuts a deal it's kind of like a bus is leaving. The first one that gets on is the only one that gets on." *Ohio v. Dixon*, 805 N.E.2d 1042, 1051 (2004). The police designed a strategy to get a coerced confession without giving *Miranda* warnings. The confession would then be followed by the warnings given in a tape recording before the confession was recorded. Based on this inverted sequence of events – refusal to answer after *Miranda* warnings, re-interrogation without warnings, confession, recorded warnings, recorded confession – the prosecution argues that the warnings after the initial confession made the confession "voluntary." The question is whether the police can cleanse what would otherwise be an inadmissible confession in this way. The Ohio trial judge said, "No," but he was reversed by the Ohio Supreme Court. We agree with the trial judge. A confession obtained by this kind of police pressure is inadmissible under *Miranda* and coerced and involuntary under the Due Process Clause. If the consequences of this kind of deliberate, unlawful conduct specifically designed to violate *Miranda* and get a confession is allowed to prevail, as our dissenting colleague contends, the time has come to simply overrule *Miranda*.

## I. Factual and Procedural Background

On November 4, 1993, Dixon was interrogated at the police station and expressly exercised his right to remain silent unless a lawyer were present, although he had not been technically "arrested" at that time. The detectives were, therefore, on notice

that Dixon did not want to talk to them in the absence of his lawyer. After his formal arrest for murder five days later on November 9, he was interrogated twice more. The detective decided not to give him any *Miranda* warnings during the first of these two sessions because as the Ohio Supreme Court found, in agreement with the trial court, "the detectives believed that Dixon would invoke his right to counsel if he were issued *Miranda* warnings," which would foreclose further interrogation and defeat their effort to get a confession. *Ohio v. Dixon*, 805 N.E.2d at 1049. The detectives' coercive strategy succeeded; in the first session, Dixon confessed to a closely related crime. Four hours later, in the second session, Dixon capitulated to the pressure. The detectives advised him of his *Miranda* rights, and he confessed to the murder.

The Ohio trial judge immediately suppressed Dixon's statements confessing to the murder because "they were obtained as a result of a deliberate, bad faith plan on the part of the police to violate his rights" under *Miranda*, including an "ultimately false" statement by the interrogator in the form of a "promise of possible benefits" if Dixon confessed. The trial judge also found that, although the detectives said that Dixon told them during the second interrogation on November 9 that he had talked to his lawyer by phone and was following his lawyer's advice to confess, this statement by Dixon was false. The trial judge found that he had not talked to his lawyer and that no lawyer would likely have given him such advice. *Ohio v. Dixon*, Trial Court Opinion and Journal entry, Appellant Appendix, Vol. 3, p. 1252. The State took an interlocutory appeal on the suppression issue, and the Ohio Court of Appeals

disagreed with the trial judge and found the confession admissible despite the deliberate violation of *Miranda*. *Ohio v. Dixon*, 656 N.E.2d 1 (1996). (This decision was later upheld by the Ohio Supreme Court. 805 N.E.2d 1042.) Dixon was then convicted on the basis of the confession of a brutal murder in which he participated with his associate in burying the victim alive. The Ohio jury sentenced him to death and then sentenced his associate to death.

After exhausting both his direct and state post-conviction appeals, Dixon filed for a writ of habeas corpus. Unlike the Ohio trial judge, the district court did not find the interrogation to be coercive. It followed the ruling of the Ohio Supreme Court on the *Miranda* violation and fully accepted its argument that *Oregon v. Elstad*, 470 U.S. 298 (1985), had held that confessions like the one in this case rendered under an "interrogate first, warn later" police strategy were admissible. Because *Miranda* and *Elstad*, as well as many other cases, forbid this type of deliberately coercive police strategy that yields an involuntary confession, we reverse the district court and issue the writ of habeas corpus.

## II. The Errors of the Ohio Supreme Court under AEDPA

To issue the writ, we must conclude that the state courts' adjudication (1) "involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). The Ohio Supreme Court erred in *both* ways. First, its

reliance on *Elstad* as the basis for admitting the confession involved an unreasonable application of that case. Second, its finding that Dixon's confession, after first asking for a lawyer, was not influenced, caused, or coerced by the detectives' deliberate "confession first, warnings later" police strategy was based on an unreasonable determination of the facts and flatly contradicted the trial court's findings. The detectives planned to get a confession by violating the *Miranda* warning requirement after Dixon asked for a lawyer, and their plan worked four hours later when they returned for further interrogation and got the confession.

The Ohio Supreme Court relied on *Oregon v. Elstad*, 470 U.S. 298 (1985), for its conclusion that Dixon's confession was admissible and not coerced and involuntary under *Miranda* and Due Process. In that case, an officer mentioned a burglary when he came in to arrest the defendant at the defendant's home. The defendant immediately responded that he was involved. *Elstad* held that the momentary statement and response had "none of the earmarks of coercion" that is likely to produce an involuntary confession, *id.* at 316, and that the defendant's later full-dress confession at the station house after full and complete *Miranda* warnings was admissible. The Court in *Elstad* defined the concept of a "coerced" confession and distinguished the case from other cases in which the failure to warn was accompanied by "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." *Id.* at 309. In a later case, *Missouri v. Seibert*, 542 U.S. 600 (2004), the U.S. Supreme Court said that the holding in *Elstad*

on its face was obviously designed to distinguish a case exactly like Dixon's in which the police follow a deliberate question-first, warn-later strategy. The Supreme Court in *Seibert* said that *Elstad* stands for the proposition that such a "police strategy adapted to undermine the *Miranda* warnings" renders the confession inadmissible "because the question-first tactic threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." *Id.* at 617. *Elstad* itself is clear, and *Seibert* simply reinforced its meaning.

In the instant case, five days before the question-first strategy was used, Dixon had made it completely clear to the police that he did not want to talk to the detectives without a lawyer present. Not only is the police strategy used here inconsistent with *Elstad* and *Seibert*, it contravenes the clear language of Chief Justice Warren's opinion in *Miranda* itself.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; *any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.* Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice individual states that he wants an attorney, the interrogation must cease until an attorney

> is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

*Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966) (emphasis added). The Supreme Court has consistently maintained that the bright-line rule of *Miranda* against further interrogation by police remains in effect. *E.g.*, *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

Moreover, in contrast to the finding of the Ohio Supreme Court that Dixon's statements at the evening interrogation four hours later were "voluntary" and not "the product of a compulsion, subtle or otherwise," the trial judge who heard the testimony of the witnesses found exactly the opposite. The trial court recounted that the detectives had engaged in a thirty-minute interrogation of Dixon before *Miranda* warnings were given and the tape recorder turned on. During that time they informed Dixon that his confederate, Hoffner, had led police to the buried body of the victim. They advised Dixon that they had not arrested Hoffner but let him go home, and then referred back to the earlier afternoon interrogation that had ended with the detective's advice to "get on the bus" because "the first one that gets on it is the only one" who will get a "deal."

This sequence of events is in direct conflict with the findings of the Ohio Supreme Court of "no

coercion" or of the "voluntariness" of Dixon's confession. The Ohio Supreme Court attempted to purge the detectives' offer of the "deal" of any coercive effect by implausibly characterizing it only as a mere "admonition to tell the truth." On the contrary, the "cut-a-deal" dialogue was another step in the effort to get a confession by persuading Dixon that he had no right to silence or a lawyer but rather a duty to incriminate himself — the very opposite of his *Miranda* rights and his right to due process. Holding out the promise of a "deal" to avoid the death penalty in return for a confession, as the trial judge found, is a high-pressure tactic designed to override Dixon's previous five-day stand against talking. A confession given in response to such tactics is not voluntary. *See Mincey v. Arizona*, 437 U.S. 385, 396-99 (1978) (positing a per se rule against use of such a coerced confession).

To summarize, there are three clear constitutional errors by the Ohio Supreme Court that remove the case from AEDPA deference under 28 U.S.C. § 2254(d):

1. The Ohio Supreme Court unreasonably applied *Miranda v. Arizona* in refusing to require the police to terminate interrogation upon the exercise of the right to have a lawyer present and in allowing the police to demand involuntary answers by reinstituting the questioning without warnings.

2. That court unreasonably applied *Oregon v. Elstad* by holding that the deliberate, planned refusal to warn, followed by warnings after confession should be treated the same as the momentary, innocent failure to warn in *Elstad*.

3. That court's finding that Dixon's confession was voluntary resulted in a decision that was based on an unreasonable determination of facts presented in the state court proceeding. The "admonition" that Dixon should "cut a deal" was not simply "an admonition to tell the truth." It was part of the coercive strategy to get Dixon to confess involuntarily. In this conclusion, we are in accord with the court that actually heard the evidence and that was in the best position to determine the facts — the Ohio trial court.

In addition, the last violation occurred in part because the Ohio Supreme Court erroneously placed the burden of proof on Dixon to prove that his confession was coerced. That court concluded that "Dixon has failed to explain how the detective's coercive subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent." 805 N.E.2d at 1050-51. This view is contrary to Supreme Court law. *E.g.*, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (holding that "coercive police activity is a necessary predicate to 'suppression' " and when shown "the state bears a 'heavy' burden in proving waiver"); *North Carolina v. Butler*, 441 US. 369, 373 (1979) (same). In *Miranda* itself the Court said that "a heavy burden rests on the government"; the satisfaction of this burden "will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U.S. at 475. Here the confession was "eventually obtained" but only after the police wore Dixon out with admittedly illegal interrogation, the only purpose of which was to get him to confess against his will. The police used both illegal

questioning and, as the Ohio trial judge found, false enticement "to cut a deal."

Accordingly, the petition for writ of habeas corpus is granted pursuant to 28 U.S.C. § 2254(d) and the State has 180 days to retry Dixon. In light of our ruling on the coercive police interrogation issue, the other issues raised in the petition are pretermitted.

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## CONCURRENCE

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COLE, Circuit Judge, concurring. I concur in the majority opinion, but write separately because I would also grant Dixon's petition on his ineffective assistance of counsel claim.

### I.

At the penalty phase, Dixon's counsel presented as "mitigating evidence" the testimony of an employee of the Bureau of Sentence Computation for the Ohio Department of Rehabilitation and Correction, who testified that Dixon would serve a life sentence with no chance for parole. Counsel also admitted into evidence a copy of Dixon's birth certificate to establish his youth. Dixon contends that his counsel's failure to present additional mitigating evidence constitutes ineffective assistance of counsel. He argues specifically, that evidence of his family history, which included evidence of domestic violence, sexual abuse, alcoholism, possible incest, and lack of positive role models, should have been presented. The Warden answers that if any such evidence had been introduced, it would have

opened the door for the prosecution to introduce evidence of Dixon's bad character and prior bad acts.

The district court held an evidentiary hearing on Dixon's ineffective assistance of counsel claim. (R. 75.) It applied the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 241 *et seq.*, to Dixon's petition, and under its deferential standard of review the district court affirmed the Ohio Court of Appeals' denial of Dixon's ineffective assistance claim. (R. 79, at 42.) Both parties on appeal agree AEDPA governs this claim; however, we must make an independent determination as to whether AEDPA applies. *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008).

In this case, AEDPA does not govern Dixon's ineffective assistance of counsel claim. When "new, substantial evidence" is presented to a federal district court on a habeas claim that was not before the state court, the state court's determination of the issue could not have been on the merits, and thus is not entitled to AEDPA deference. *Brown*, 551 F.3d at 429 (holding that the rule announced in *Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006), that AEDPA does not apply to habeas claims premised on *Brady* material that appears for the first time during federal proceedings "applies generally"). This rule only applies, however, if the threshold standard for admitting new evidence is met.

In *Brown*, we found that the district court erred in applying AEDPA to the ineffective assistance claim on habeas review because "the counseling notes that form[ed] the basis of the claim were not in the record before the Michigan Court of Appeals, and that court explicitly acknowledged that

its review was limited to mistakes apparent on the record." *Id.* at 428-29 (internal quotation marks and citation omitted). On post-conviction review, the Ohio Court of Appeals applied the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and held that Dixon failed to prove his ineffective assistance of counsel claim after reviewing the evidence Dixon submitted to support his claim, a report prepared by a mitigation specialist and affidavits from several individuals. *State v. Dixon*, 2000 WL 1713794, at *16 (Ohio Ct. App. Nov. 17, 2000). At the federal evidentiary hearing, the district court heard evidence not before the state court through the testimony of Dixon's trial counsel, Mark Geudtner and Joe Scalzo, as well as Gary Ericson (the mitigation specialist hired by Dixon's trial counsel), Dr. Christopher Layne (the psychologist hired by Dixon's trial counsel) and Anna Marie Dixon (Dixon's mother). The district court thus based its decision to deny Dixon's petition for habeas corpus, at least in part, on "new, substantial evidence," *Brown*, 551 F.3d at 429, not previously before the state courts. Therefore, AEDPA will not apply if the district court properly allowed Dixon to admit new evidence.

In order to admit new evidence on a habeas petition before a district court, the following standard must be met: "(1) the petitioner must not be at fault for failing to develop the evidence in state court, or (2) if the petitioner is at fault, the narrow exceptions set forth in 28 U.S.C. § 2254(e)(2) apply." *Brown*, 551 F.3d at 429 (citing *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004)). We review a district court's decision to hold an evidentiary hearing under an abuse-of-discretion standard. *Lott v. Coyle*, 261

F.3d 594, 602 (6th Cir. 2001). The district court found that Dixon diligently sought an evidentiary hearing in the state courts, was repeatedly denied, and was not at fault for failing to develop the record in state court. (R. 79, at 21.) If a petitioner is not barred by 28 U.S.C. § 2254(e)(2) from receiving an evidentiary hearing, the district court has discretion to grant a hearing, *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007), but it must consider whether a hearing "could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. Dixon alleged that his counsel failed to create a mitigation strategy and had no strategic reason for their failure to present mitigation evidence. The district court correctly concluded that if these factual claims were true, it could entitle Dixon to relief on his ineffective assistance claim. Therefore the district court did not abuse its discretion in granting an evidentiary hearing on this claim.

Because the district court's decision rested on properly admitted "new, substantial evidence," AEDPA is inapplicable and "the pre-AEDPA standard of review [applies]: de novo for questions of law (including mixed questions of law and fact), and clear error for questions of fact." *Brown*, 551 F.3d at 430. "The performance and prejudice components of *Strickland* present mixed questions of law and fact and are reviewed de novo." *Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008).

II.

To prevail on an ineffective assistance of counsel claim, "the petitioner must show that: (1) counsel's performance was deficient, and (2) the

deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Keith v. Mitchell*, 455 F.3d 662, 670 (6th Cir. 2006) (citing *Strickland*, 466 U.S. at 687 (1984)).

### A. Deficient Performance

Dixon contends he was denied the effective assistance of counsel because his counsel failed to investigate and present relevant mitigating evidence during the penalty phase. Dixon had the assistance of Joe Scalzo and Mark Geudtner during both the guilt and penalty phases of his trial. At the outset, they divided the responsibilities between them; Geudtner was responsible for the pretrial motions and the trial, and Scalzo was responsible for the penalty proceedings. In preparation for the penalty phase, they hired Ericson, a licensed private investigator and mitigation specialist, and Dr. Layne, a clinical psychologist. Ericson completed a fifty-one page mitigation report that included extensive evidence of Dixon's dysfunctional family and social history, and gave the report to Scalzo. Ericson met with defense counsel early in the process, but had no contact with them after that and never discussed his report with either Scalzo or Geudtner. Dr. Layne conducted a battery of psychological tests on Dixon, but concluded that the results would not have been helpful to Dixon in the penalty phase and did not complete his report.

Geudtner testified that he realized at the end of the trial that Scalzo had prepared insufficiently for mitigation. Thus, Geudtner spent the weekend after the guilty verdict was rendered developing

three arguments to put before the jury in the mitigation phase.[1] Geudtner planned to introduce evidence showing that: (1) Dixon had served eight months in jail for a crime for which he was later exonerated by DNA evidence; (2) Dixon offered to plead guilty if the death penalty were not sought and the prosecution rejected his offer; and (3) other capital cases in the area did not result in the death penalty for those defendants. Geudtner did not seek a ruling from the trial court on whether such evidence would be admissible at the penalty phase, however, and the court prohibited Geudtner from presenting it. Geudtner explained that he did not seek a ruling on the admissibility of this evidence prior to the start of the penalty phase because he did not want to give the prosecution a preview of his strategy. Unfortunately for Dixon, this left defense counsel unclear about their overall strategy; the trial court granted a continuance only until that afternoon for counsel to develop a mitigation strategy.

A defendant has "a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams v. Taylor*, 529 U.S. 362, 393 (2000). In order to prove his counsel were deficient, Dixon must show "that his 'counsel's representation fell below an objective standard of

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[1] To the extent that Geudtner tried to compensate for this co-counsel's failures, his efforts are laudable. They do not, however, constitute effective assistance. Failure to begin mitigation preparations before the close of the guilt phase is objectively unreasonable under *Strickland*. *See Jells v. Mitchell*, 538 F.3d 478, 493 (6th Cir. 2008) (collecting cases).

reasonableness.'" *Awkal v. Mitchell*, 613 F.3d 629, 638 (6th Cir. 2010) (en banc) (quoting *Strickland*, 466 U.S. at 688). When deciding whether counsel's assistance was deficient at the penalty phase we do not decide "'whether counsel should have presented a mitigation case,' but rather, 'whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background was itself reasonable.'" *Jells v. Mitchell*, 538 F.3d 478, 491 (6th Cir. 2008) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)). When determining the reasonableness of counsel's investigation, the "quantum of evidence known to counsel must be considered, as well as whether that evidence should have led a reasonable attorney to investigate further." *Clark v. Mitchell*, 425 F.3d 270, 284 (6th Cir. 2005) (citing *Wiggins*, 539 U.S. at 527).

Dixon argues that his counsel were deficient in failing to introduce mitigating evidence of Dixon's dysfunctional family and social history, which included domestic violence, possible incest, alcoholism, and negative role models, and by failing to call the following witnesses: his mother, older brother, and his foster parents Nancy and Dale Wolfe. The Warden argues that defense counsel's "life means life" mitigation theme was a strategic decision not to introduce details of Dixon's past in order to avoid the admission of evidence of Dixon's bad character and prior bad acts. Dixon claims that it was deficient for his counsel not to consider a way to cabin witnesses' testimony to avoid introduction of such evidence and for failing to make a motion in limine to exclude his prior conviction.

*Strickland* dictates that counsel's performance must be evaluated "under prevailing professional norms." 466 U.S. at 688. "[T]he ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003). The Supreme Court has clarified though, that "[r]estatements of professional standards . . . can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, — U.S. —, 130 S.Ct. 13, 16 (2009) (citing *Strickland*, 466 U.S. at 688) (explaining that looking to the ABA guidelines announced eighteen years after [the defendant] went to trial ignored the limitations set by *Strickland*). The guilt and penalty phases of Dixon's trial were conducted in October-November 1995. Therefore, the guidelines in place at that time, the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), are useful in determining what constitutes reasonable representation. As explained in the guidelines, "[c]ounsel should consider all pretrial motions potentially available" to address issues such as "matters of evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion in limine." *Id.* at § 11.5.1. With regards to presentation of evidence at sentencing, counsel should present "all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." *Id.* at § 11.8.6. The ABA guidelines support the

commonsense notion that when faced with the possibility of the prosecution introducing damaging rebuttal evidence, counsel should make reasonable efforts to prevent this from occurring.[2]

Neither of Dixon's attorneys filed a motion in limine to prohibit Dixon's past conviction from being admitted,[3] nor did either attorney speak with any of the potential witnesses or Ericson to develop a strategy to present mitigating evidence without permitting the admission of potentially aggravating evidence from Dixon's life. Of course, if there were no legal avenue for counsel to pursue to prevent such evidence from being admitted, failure to do so could not be considered unreasonable. A brief examination of Ohio law is therefore necessary to determine

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[2] The 2003 revised edition explicitly addresses this scenario and states that

> when faced with the possibility that any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence[,] [c]ounsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, § 10.11 (2003 rev. ed.)

[3] Defense counsel filed a motion to exclude any evidence of other crimes, wrongs, or acts on December 5, 1993, almost two years before the trial began. The trial court denied the motion finding that "any evidentiary issues dealing with other criminal acts [would be] dealt with during trial as they arose." Nothing in the record indicates this issue was ever revisited by either party or the court.

whether counsel's lack of investigation of this issue was constitutionally deficient.

Under Ohio law, the "history, character, and background of the offender" is a statutory mitigation factor, Ohio Rev. Code § 2929.04(B), and defendants have "great latitude in the presentation of evidence of [mitigation] factors." Ohio Rev. Code § 2929.04(C). The Ohio Supreme Court has found that the prosecution's burden of proving beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors "empow[ers]" the prosecutor "to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false." *State v. DePew*, 528 N.E.2d 542, 554 (Ohio 1988). But this rebuttal is limited "to those instances where the defense offers a *specific assertion*, by a mitigating witness or by the defendant, that misrepresents the defendant's prior criminal history." *State v. Henness*, 679 N.E.2d 686, 698 (Ohio 1997) (emphasis added). Additionally, evidence of a defendant's good character presented at mitigation allows the prosecution to rebut with evidence of the defendant's prior bad acts. Ohio R. Evid. 404(A)(1); see also *State v. Jalowiec*, 744 N.E.2d 163, 177-78 (Ohio 2000) (explaining that defendant opened the door to rebuttal by "call[ing] several witnesses [at sentencing] to testify about what a good person he was.")[4]

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[4] The Ohio rules of evidence apply to the penalty phase of a capital trial. *State v. Lorraine*, 613 N.E.2d 212, 220 (Ohio 1993).

The relevant law demonstrates that evidence misrepresenting Dixon's criminal past, or evidence of his good character, might have opened the door to rebuttal evidence by the prosecution. *See Jalowiec*, 744 N.E.2d at 177 ("The trial court has discretion to determine what relevant evidence is admissible as proper rebuttal."). But more importantly, the details of Dixon's dysfunctional family history would not. We previously found this to be true when interpreting Ohio law in *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003). In *Mason*, we explained that, "[t]estimony that simply put Mason's childhood into context without misrepresenting it would not have been subject to the prosecutor's rebuttal evidence[.]" *Id.* at 627; *see also id.* at 622 ("[T]estimony in this case concerned Mason's troubled childhood . . . which would have aided him at sentencing because it did not give the prosecutor the same opportunity for rebuttal that evidence about good character or rehabilitation potential could have.")

This case is similar to *Mason* in another important respect. In *Mason*, defense counsel obtained *some* mitigating information, and we explained that "the limited information obtained by defense counsel did not *discharge* counsel's duty to investigate, but *triggered* the duty to investigate." *Mason*, 320 F.3d at 624 n.12. To determine the reasonableness of counsel's investigation, we look at the "quantum of evidence known to counsel" and whether "that evidence should have led a reasonable attorney to investigate *further*." *Clark*, 425 F.3d at 284 (citing *Wiggins*, 539 U.S. at 527) (emphasis added).

Here, Dixon's counsel had a detailed, thorough mitigation report and several witnesses willing and available to testify, yet neither attorney investigated a way to use any of this evidence, either by discussing with potential witnesses or Ericson a way to limit their testimony to only those subjects that would not "open the door" for the prosecution, or by filing a motion in limine in the hope that the court would deny admission of Dixon's prior conviction. Scalzo explained that he was concerned about the jury learning of Dixon's criminal history, but also acknowledged that the evidence could be found too prejudicial to be admitted. Scalzo could not remember if he and Geudtner ever discussed the possibility of filing such motions, and there is no evidence they ever discussed the mitigation phase. Geudtner stated that he left preparation of the mitigation phase entirely to Scalzo, and realized at the end of the guilt-phase portion of the trial that Scalzo "hadn't prepared much" and "pretty much fell flat on his face." He described Scalzo's performance as "overwhelmingly deficient."

To determine the reasonableness of counsel's mitigation strategy, "'a reviewing court must consider the reasonableness of the investigation said to support that strategy.'" *Jells v. Mitchell*, 538 F.3d 478, 492 (6th Cir. 2008) (quoting *Wiggins*, 539 U.S. at 527). Given the "great latitude" Ohio grants defendants in the presentation of mitigation evidence, "professionally competent assistance in Ohio capital cases" requires a "reasonably thorough investigation into all possible mitigation evidence that would present a sympathetic picture of the defendant's family, social, and psychological background." *Id.* at 495-96 (citing *Wiggins*, 539 U.S.

at 524). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91 (emphasis added); *see also Spisak v. Mitchell*, 465 F.3d 684, 704 (6th Cir. 2006) ("[A]ny decision to forego mitigation evidence is unreasonable if not made after a reasonable determination to cease further investigation."), *overruled on other grounds by Smith v. Spisak*, 554 U.S. — , 130 S. Ct. 676 (2010). If counsel stops short of a thorough investigation, however, "'the deference owed to counsel's strategic judgments about mitigation is directly proportional to the adequacy of the investigations supporting such judgments.'" *Eley v. Bagley*, 604 F.3d 958, 973 (6th Cir. 2010) (quoting *Jells*, 538 F.3d at 492).

Dixon's counsel did not speak with any of the witnesses who could have testified on Dixon's behalf. Without any investigation regarding the extent to which rebuttal evidence might be allowed, defense counsel abandoned the idea of introducing any evidence related to Dixon's extremely dysfunctional family in favor of a "life means life" mitigation theme. Scalzo described his mitigation strategy as, "to go on more economical things: How long is a person supposed to live while in prison, how much is it going to cost, versus giving him death, from an economic standpoint." Geudtner, who began working on the penalty phase the weekend before it was set to begin, after learning Scalzo had prepared nothing, testified that he never read Ericson's report.

Counsel's failure to make a thorough investigation of either law or facts made "a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527-28. Counsel's decision not to present any of the evidence available to them in mitigation was not reasonable and their performance at the penalty phase was deficient under *Strickland*.[5]

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[5] Counsel's deficient performance at the mitigation phase is particularly troubling when viewed within the larger trial context. Counsel put on no case-in-chief and cross-examined only three of the state's fifteen witnesses at the guilt-phase portion of the trial. The trial transcript of the state's witnesses was 364 pages long, with only eight of the pages covering cross-examination. Scalzo agreed that "there was very little cross-examination of any witness." Geudtner described their strategy once the trial started as to "pretty much just to sit there and take it," because he did not feel that they had "much of a chance to prevail on the guilt phase of the trial."

Furthermore, Scalzo's other explanation for not presenting mitigating evidence is similarly unreasonable. Scalzo explained that he did not present evidence of Dixon's family history because "it was from our experience that juries weren't buying that. In the situation—I didn't want to upset them any more than they already were about the crime." Counsel's explanation that he viewed the report as not helpful is not a strategic decision, but rather "an abdication of advocacy." *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (finding counsel's failure to present mitigating witnesses "because he did not think it would do any good," even though several friends, relatives, experts and a minister were available and willing to testify,"an abdication of advocacy" and not a strategy). When a defendant has been found guilty of death penalty charges, he is "virtually guaranteed a sentence of death unless he [can] produce sufficient mitigation evidence at the penalty phase to generate reasonable doubt in the mind of at least one juror." *Frazier v. Huffman*, 343 F.3d 780, 793 (6th Cir. 2003).

### B. Prejudice

A finding of deficient performance alone is insufficient for Dixon to prevail on an ineffective assistance of counsel claim. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. He must also demonstrate prejudice, that is, a reasonable probability that the newly available mitigation evidence would have led to a different outcome. *Wiggins*, 539 U.S. at 537. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, if there is a reasonable probability that a single member of the jury would have found that the aggravating circumstances of the crime did not outweigh the mitigating circumstances, Dixon is entitled to a new penalty-phase trial. *See State v. Robb*, 723 N.E.2d 1019, 1044 (Ohio 2000) (only a unanimous jury can impose death). Dixon has met this burden.

To determine prejudice we must "reweigh the mitigation evidence against the evidence of aggravation. . . . including evidence presented in habeas proceedings." *Williams v. Anderson*, 460 F.3d 789, 804 (6th Cir. 2006). "Prejudice is established where, taken as a whole, the available mitigating evidence might well have influenced the sentencer's appraisal of the petitioner's moral culpability." *Jells*, 538 F.3d at 498 (citation and internal quotations omitted).

The jury found Dixon guilty of the following aggravating circumstances presented at sentencing: (1) that he was the principal offender and committed

the murder during a robbery and kidnapping; and (2) that he had committed the murder with prior calculation and design. *Dixon*, 805 N.E.2d at 1058. The evidence submitted at the penalty phase in mitigation was Dixon's age at the time of the offense (twenty years old) and the testimony of the Chief of the Bureau of Sentence Computation, who testified to the time of actual incarceration if the jury recommended a life sentence. The jury did not hear any evidence related to Dixon's background.

In support of his ineffective assistance claim, Dixon submitted Ericson's report along with affidavits from James Eisenberg (a forensic and clinical psychologist), Paul Dixon, Jr. (Dixon's brother), Anna Marie Dixon (his mother), Nancy Wolfe (his former foster mother), David Lewis (his high-school wrestling coach), and testimony of several individuals from the federal court evidentiary hearing. Ericson's mitigation report, more than fifty pages in length, was the result of a comprehensive review of a multitude of records, including, school, employment, hospital, psychological, and court records, as well as interviews with Dixon's mother, brother, former foster parents, former probation officer, a deacon and Dixon's church, and the mother of Dixon's girlfriend.

The report revealed the following details about Dixon. His family life was dysfunctional and abusive, and he had no positive role models, outside of approximately eighteen months living with foster parents. There was a family history of alcoholism. Dixon's father, uncle, paternal grandfather, and both maternal grandparents were alcoholics, and his mother had a "drinking problem." Dixon's father

was arrested between seven and ten times for driving under the influence of alcohol and was ordered by a court to attend an alcohol treatment program.

Dixon's father physically abused him. Lucas County Children Services records revealed a history of abuse of both Dixon and his brother by both parents, but that Dixon's father was "particularly abusive when drinking especially to [Dixon]." Indeed, Dixon's mother filed, but later dropped, several domestic violence charges against Dixon's father. His father's violence was not limited to Dixon, however. Dixon's foster mother described how employees at the local court feared Dixon's father because he had once made a death threat to a court employee. One evening, Dixon's father shot six rounds of his shotgun from inside the home because he was angry at Dixon's mother.

The accounts of abuse Dixon endured from his father are particularly troubling. The father hit Dixon with a baseball bat, "kicked" him, "smacked" him, and "lost control" with Dixon. In one instance, Dixon did not do what his father asked, causing his father to "put his steel toed boots on" and kick Dixon "like a man;" as a result, one of Dixon's ribs is deformed. In another incident, Dixon's father hit him in the face so hard it left fingerprints. The police were called, but his mother explained that "luckily" Dixon was asleep, with his face down where he had been hit. The police left without any further investigation or arrest. Dixon himself described his father as "very aggressive" and stated that his father beat him a number of times; Dixon's brother described their father as "explosive."

Ericson further reported that Dixon himself suffered from alcohol abuse, polysubstance abuse, anxiety and depression. He began taking drugs when he was thirteen years old, when "behavioral and family issues were most significant." He attended a treatment and rehabilitation center, and "[a]ttention was given to his lack of understanding of the negative consequences of his drug involvement and the lack of a male role model." Ericson's report summarized medical records indicating that individual counseling was recommended due to the high level of dysfunction within the family, but that the family could not be motivated to follow through with these suggestions.

Additionally, Dixon's brother, Paul Dixon, Jr., a Marine based in North Carolina, was available to testify on Dixon's behalf. Paul explained how he spent little time at home during his youth, and how an environment away from his home allowed him to "have abilities and qualities that are basic to most people, but not common to my immediate family." He described his family as "extremely tense," "often disruptive and perhaps dysfunctional." He attested that Dixon did not have the benefit of an extended removal from the family as he did, and how Dixon was "negatively affected because of it."

Paul's statements are supported by Dixon's former foster parents, Nancy and Dale Wolfe – who had Dixon in their care for about one to one and one half years. They "observed a major backslide [in Dixon's behavior]" and how he "became very defiant" and "belligerent" when the court decided to release him back to his parents. Nancy Wolfe explained how Dixon "modeled his behavior after his father." Dixon

told Dale Wolfe that he was fearful of his father and did not want to go home.

There is also evidence of incest and sexual abuse within the family. Dixon's sister was repeatedly molested by her maternal grandfather as a child. Records from Lucas County Children Services indicate that sexual contact and possible intercourse occurred between both brothers and their sister, as well as their father and their sister. Both parents resisted counseling and characterized their sons' behavior as "normal curiosity."

A case worker with the Lucas County Court of Common Pleas, Juvenile Division, did a case assessment on the Dixons after several sessions with the family. He described sexual encounters between the siblings and felt they learned such behavior from their father. When asked about the sexual inappropriateness, Dixon's father threatened the case worker and told him he was "asking for serious trouble." The case worker explained how the Dixon family was given the worst score regarding "family system pathology" from "day one," never improved, and was one of the worst families with which he had worked.

The Warden argues that details of Dixon's childhood would have had little or no effect on his sentence. The evidence belies such a conclusion. The evidence shows Dixon's family history was filled with chronic alcoholism, domestic violence, possible incest, and negative role models. As Dr. Eisenberg explained, this information would have provided the jury with "insight and understanding into the development of Dixon's personality and pathology,"

and "an understanding of the family dynamics that lead to Mr. Dixon's violent behavior."

The circumstances of the crime are heinous, there is no doubt. But at no point during the trial did the jury hear any details of Dixon's dysfunctional and abusive upbringing. It is arguable whether any *actually* mitigating evidence was presented. The introduction of Dixon's birth certificate showed the jury that he was above the age of eighteen when he committed the offense. The testimony of the Bureau of Sentence Computation employee was even less helpful, as the Ohio Supreme Court explained that "sentence computations [are] entitled to no weight in mitigation." *Dixon*, 805 N.E.2d at 1062 (citing *State v. White*, 709 N.E.2d 140, 155-56 (Ohio 1999). The large discrepancy between the nominal evidence given to the jury and the available evidence of Dixon's dysfunctional family life demonstrates a reasonable probability that at least one member would not have returned a sentence of death. *See Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (finding prejudice where the evidence not presented at sentencing "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury").

The evidence of Dixon's family history would have presented the jury with a different calculation to make at the penalty phase. As we have explained before,

> 'I and the public know [w]hat all schoolchildren learn,' it has been said, "[t]hose to whom evil is done [d]o evil in return." W.H. Auden, "September 1, 1939." While these words may not capture a satisfactory theory of

> morality, they assuredly suggest a plausible theory for sparking a life at a mitigation hearing[.]

*Johnson v. Bagley*, 544 F.3d 592, 606 (6th Cir. 2008) (finding prejudice under *Strickland* because the new evidence differed "from that heard by the jury not only in degree but also in kind"); *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.").

In *Williams v. Anderson*, we found prejudice when similar facts were not presented as mitigating evidence, namely, the defendant's alcoholic and abusive mother, lack of father figure, primary male role model's career as a criminal, and a violence-condoning environment. 460 F.3d 789, 804-05 (6th Cir. 2006); *see also Morales v Mitchell*, 507 F.3d 916, 951 (6th Cir. 2007) (Suhrheinrich, J., dissenting) (noting we have "found prejudice when the jury was deprived of non-cumulative mitigating evidence such as severe physical, psychological, or sexual abuse, a violent upbringing, or abject poverty"). Additionally, we have found prejudice where the jury heard little to no evidence in mitigation when compared to what evidence could have been presented on the defendant's behalf. *See Hamblin v. Mitchell*, 354 F.3d 482, 490, 493 (6th Cir. 2003) (finding prejudice where counsel did not present the jury with any mitigating evidence and evidence of a childhood where "abuse, neglect, violence and hunger were

common" existed); *Frazier*, 343 F.3d 780, 797 (6th Cir. 2003) (no evidence presented at the penalty phase except the defendant's one-sentence plea for mercy and defense counsel could have presented evidence of defendant's brain injury).

Dixon's case is no different from those where have found prejudice in both respects. The jury heard no evidence during the guilt phase of the trial that could be considered mitigating. And the evidence presented at the penalty phase did not address any actual mitigating factors. Furthermore, the evidence of Dixon's extremely dysfunctional family never heard by the jury is similar to evidence in cases where we have found prejudice. Had Dixon's counsel presented to the jury evidence of the abusive and tragic upbringing Dixon experienced, there is a reasonable probability that at least one juror would have voted not to put him to death. Indeed, given the circumstances of the offense, the submission of such evidence is precisely what was called for during the penalty phase. The failure by Dixon's counsel to present any of this evidence was constitutionally deficient by any measure.

Accordingly, while I join the majority opinion, I would also reverse the district court's denial of Dixon's petition for a writ of habeas corpus on his ineffective assistance of counsel claim.

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## DISSENT

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SILER, Circuit Judge, dissenting. I respectfully dissent from the majority opinion

finding that the Ohio Supreme Court unreasonably applied clearly established federal law in deciding this case based on the evidence presented in the state court under 28 U.S.C. § 2254(b). Whether this court would rule otherwise is not the issue. Instead, we must look at *State v. Dixon*, 805 N.E.2d 1042 (Ohio 2004), to see if it was contrary to 28 U.S.C. § 2254(b). As the majority indicates, the Ohio Supreme Court found that the second statement by Dixon to the officers on November 9, 1993, was admissible under the authority of *Oregon v. Elstad*, 470 U.S. 298 (1985).

Although Dixon has argued that the Ohio Supreme Court should have followed *Missouri v. Seibert*, 542 U.S. 600 (2004), I agree with the majority when it indicates that the *Seibert* decision was not binding upon the Ohio Supreme Court at the time it decided *State v. Dixon*. The Ohio Supreme Court rendered its opinion in *Dixon* on April 14, 2004, and denied reconsideration on June 9, 2004. *Seibert* was not decided by the United States Supreme Court until June 28, 2004. Nevertheless, we can review what *Seibert* said about *Elstad*.

The facts in this case resemble the facts in *Elstad* and *Seibert*, but are easily distinguished. In *Elstad*, the accused made an initial inculpatory statement without *Miranda* warnings at the time of his arrest at his home. His subsequent confession at the sheriff's office one hour later after being advised of his *Miranda* rights was admissible. In *Seibert*, the accused was questioned first for 30 to 40 minutes without *Miranda* warnings. After admitting her guilt, Seibert was given a 20-minute break, after which the officers advised her of her *Miranda* rights,

and she then admitted her guilt again. However, as stated above, the Ohio Supreme Court did not have the *Seibert* decision as evidence of clearly established federal law at the time of its decision in *Dixon*.

In our case, the officers at the time of the first interrogation on November 9 deliberately decided not to use the *Miranda* warnings, because they thought Dixon would invoke his right to silence. Later, at the second interrogation on November 9, circumstances had changed significantly. First, Dixon was initially arrested for forgery, not murder. At the time of the first interrogation, the officers knew of the disappearance of Hammer, the victim, but had not found the buried body. The first interview lasted approximately 45 minutes, and the police focused their questions on Hammer's disappearance. Dixon denied knowledge of Hammer's disappearance during that interrogation, but admitted the forgery of Hammer's automobile title. *Dixon*, 805 N.E.2d at 1049. Also significant is that between the time of the first interview on November 9, which concluded at 3:30 p.m., and the second interview, which began at 7:30 p.m., the police found Hammer's body. At the second interview, before being questioned, "Dixon volunteered that he had heard that police had found the body and asked whether Hoffner [co-defendant] was in custody." *Id.* Dixon also said that he had talked to his attorney and wanted to tell the police what happened. The majority says that the trial judge found otherwise, but the Ohio Supreme Court found that he told this to the detectives questioning him. *Id.* at 1050. After being advised of his *Miranda* rights twice and signing a waiver-of-rights form, Dixon implicated himself in Hammer's death. *Id.*

The Ohio Supreme Court correctly followed federal law. In *Elstad*, the Supreme Court emphasized the coercive effect of the initial interview without *Miranda* warnings. Thus, it said:

> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case.

*Elstad*, 470 U.S. at 312. It went on to hold "that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. Obviously, the first statement of November 9 was not coercive. One might feel that the deliberate act by the officers failing to advise Dixon of his *Miranda* rights on the first interview was an improper tactic. However, Justice O'Connor, the author of *Elstad*, later declared in her dissent in *Seibert* that the state of mind of the police is irrelevant to the voluntariness of the suspect to abandon his rights. *Seibert*, 542 U.S. at 625 (O'Connor, dissenting) (citing *Moran v. Burbine*, 475 U.S. 412, 423 (1986)).

It is my belief that these facts, including (1) the passage of time between the two interviews on November 9; (2) Dixon told the officers he had talked to his attorney and wanted to make a statement; and (3) circumstances had changed between the two interviews, that is, that the officers had found the body and the likely charge would be homicide not

forgery, are sufficient to dissipate the taint of the initial interview of November 9. The Ohio Supreme Court followed *Elstad* in making this determination, and I would not find that it unreasonably applied *Miranda* or *Elstad*.

Although the majority also discusses the alleged erroneous burden of proof on Dixon to show that his confession was coerced, that issue was not certified to this court and has not been raised by Dixon.

Moreover, even if there was a *Miranda* violation, the admission of the "confession at trial is subject to harmless error analysis." *Arizona v. Fulminante*, 499 U.S. 279, 303 (1991). Under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), an error is harmless unless it "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637. Here, several witnesses established that Dixon stole Hammer's car about the time of his disappearance. Even more damaging, however, was the testimony of Kirsten Wilkerson, Dixon's girlfriend, who described in great detail the efforts of both Dixon and Hoffner, as well as her own participation, to kill Hammer and transport him to the burial site. Thus, the admission of Dixon's statement to the police did not have a substantial and injurious effect upon the jury's verdict.

I also respectfully disagree with the concurring opinion by my distinguished colleague in which he indicates that he not only concurs with the majority opinion on the *Miranda* issue, but that he would also grant the writ on the basis that Dixon received ineffective assistance of counsel during the mitigation phase of the trial.

Although the parties and the district court all agreed that AEDPA sets up the standard of review on this issue, and although no error was claimed either in the district court or in this court for failure to consider this under a de novo standard, that concurrence may be correct that AEDPA does not apply because the district court held an evidentiary hearing involving the testimony of several witnesses. Without deciding which standard applies, however, I would affirm the district court under either the AEDPA standard or a de novo review for the reasons set out herein. Also, like the district court, I would find that under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), Dixon has failed to show prejudice by the alleged deficient performance on the part of his counsel during the penalty phase of the trial. In determining prejudice, "a petitioner 'need not show that counsel's deficient conduct more likely than not altered the outcome of the case,' but only 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Williams v. Anderson*, 460 F.3d 789, 801-02 (6th Cir. 2006) (quoting *Strickland*, 466 U.S. at 687-88). Moreover, "the prejudice question is 'whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Smith v. Mitchell*, 348 F.3d 177, 199 (6h Cir. 2003) (quoting *Strickland*, 466 U.S. at 695). During the mitigation phase, trial counsel only presented the testimony of Sally Ann Walters concerning the significance of a sentence of life without parole for 20

years or life without parole for 30 years and a certified copy of Dixon's birth certificate to show his age. Nevertheless, counsel conducted a significant investigation through Gary Ericson, a licensed private investigator and mitigation specialist, and a psychologist, Dr. Christopher Layne.

Ericson prepared a 51-page mitigation report. He reviewed reports detailing Dixon's birth, juvenile, educational, employment and psychological histories. He offered information about Dixon's family environment, including physical violence and emotional abuse from his father. He also investigated possible sexual abuse, which actually was inflicted by Dixon against a four-year-old child. Ericson found that Dixon had been committed to a juvenile facility and earned a GED there. He also had a positive adjustment in his placement with a foster family. Ericson also found that Dixon had raped his younger sister and started taking drugs at the age of thirteen. Ericson presented his report to trial counsel, who found that Dixon did not want it to be presented to the jury. Counsel said Dixon was upset about it and would go "ballistic in the courtroom if all this information was presented at a sentencing hearing." The psychologist, Dr. Layne, had concluded before the trial that Dixon's intelligence was low-normal. He also found that Dixon had a criminal personality, called an antisocial personality disorder. He told defense counsel that he would not be helpful if called as a witness, in view of his findings. He knew that Dixon's medical records had indicated possible Reyes Syndrome as a child, but he did not find any symptoms of Reyes Syndrome. He also reasoned that Dixon did not exhibit any of the primary symptoms of brain

damage. In view of this information, Dixon's counsel strategically decided not to introduce the testimony of either Ericson or Layne.

Trial counsel have an obligation to conduct a full investigation of their client's background in death penalty cases. *Williams v. Taylor*, 529 U.S. 362, 396 (2000). The district court found that the failure to use Dr. Layne as a witness was not a deficient performance, because his testimony would not have helped Dixon. On the failure to call Ericson as a witness, the court found that there was no prejudice, because evidence of a poor childhood likely would not have been sufficient to change a juror's mind. The district court found that, had the defense tried to show that Dixon was a "good guy," his previous conduct including the conviction for gross sexual imposition on a four-year-old child, "would surely have been introduced into evidence."

Although the concurrence criticizes the fact that counsel did not speak with any of the witnesses who could have testified for Dixon, the mitigation report from Ericson was a very thorough product. The law does not require that each counsel discuss with all potential witnesses what his or her testimony is supposed to be, so long as someone explores it and counsel concludes that for strategic reasons the evidence should not be introduced. Even the concurring opinion agrees that Ericson's mitigation report was a comprehensive review of Dixon's background. The aggravating facts of the homicide and the burial of the victim while he was still alive was such a heinous crime that it would have been difficult to find anything to mitigate the

crime unless the offender was insane or mentally retarded, which was not the case here.

This case is a companion to *Hoffner v. Bradshaw*, 622 F.3d 487 (6th Cir. 2010), which recites additional facts from the trial. Because the majority and concurrence do not discuss the other issues under the certificate of appealability, I also do not. However, I find no merit in any of the other issues raised and would affirm the denial of the writ of habeas corpus by the district court.

# APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 3:05-CV-1290

ARCHIE DIXON

Petitioner,

vs.

MARC C. HOUK, Warden,

Respondent.

**ORDER & OPINION**
Filed: July 23, 2008

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On December 23, 2005, Archie Dixon filed a petition seeking a writ of habeas corpus under 28 U.S.C. § 2254. In seeking relief in this death penalty case, Petitioner Dixon says that constitutional error attended his conviction and resulting death penalty sentence. [Doc. 18]. On October 26, 2007, this Court held an evidentiary hearing. For the reasons stated below, the Court **DENIES** Dixon's petition for a writ of habeas corpus.

## I. Background

On direct review, the Ohio Supreme Court set forth the factual background of this case. The Court presumes the state court's factual findings to be correct unless the petitioner shows by clear and

convincing evidence that the findings are erroneous. *See* 28 U.S.C. § 2254(e)(1).

A. Investigation

Archie J. Dixon, defendant-appellant, and Christopher Hammer were friends and former housemates. On September 22, 1993, Dixon and a co-defendant, Timothy Hoffner, beat Hammer, tied him to a bed, and stole the contents of his wallet and his automobile. Dixon and Hoffner then drove Hammer to a remote area, buried him alive in a shallow grave, and left him to die. Dixon was convicted of the aggravated murder, aggravated robbery, and kidnaping of Hammer, and was sentenced to death.

Hammer began his friendship with Dixon and Hoffner in the summer of 1993. For a short period of time in mid-August 1993, Dixon, Hoffner, and Hammer stayed at the Toledo home of Kirsten Wilkerson, Dixon's girlfriend.

In early September 1993, Dixon, Hoffner, and Michael Elting borrowed Hammer's car, a 1987 Dodge Daytona, to go the movies. According to Elting, Dixon and Hoffner discussed what they could do with Hammer's car and where they could store it.

On the afternoon of September 21, 1993, Dixon told Wilkerson that he and Hoffner were going to "get Chris tonight." Wilkerson understood this to mean that Dixon and Hoffner were going to kill Hammer. Later

that evening, Dixon, Hoffner, and Hammer met at a Toledo pool hall.

In the early morning of September 22, Dixon, Hoffner, and Hammer arrived at Wilkerson's house. Once there, Dixon and Hoffner attacked Hammer and severely beat him. Hoffner tried to break Hammer's neck, and Dixon struck Hammer in the head with a wine bottle. Hammer, in substantial pain and bleeding, begged his attackers to stop. Dixon and Hoffner then tied Hammer to a bunk bed ladder, and Dixon went through Hammer's wallet, taking $11 in cash, Hammer's birth certificate, and his Social Security card. At one point, Dixon and Hoffner discussed how they could dispose of Hammer's body.

Dixon and Hoffner left Wilkerson's house to dig a grave, while Hammer remained tied to the ladder. After Dixon and Hoffner returned, they, along with Wilkerson, drove Hammer to the grave site in Hammer's car. Wilkerson stayed at the car while Dixon and Hoffner walked Hammer into the woods, where they smoked a cigarette and said a prayer. They then gagged and blindfolded Hammer, tied his hands and feet behind his back, and pushed him into the grave, still alive. Dixon and Hoffner held Hammer down while they covered him with dirt. After Hammer was completely buried, Dixon and Hoffner walked back and forth across the grave, packing down the dirt.

On September 25, 1993, as part of a plan to sell Hammer's car, Dixon obtained a

state of Ohio identification ("ID") card with his photograph but in Hammer's name. On September 30, Dixon obtained a duplicate certificate of title for Hammer's Dodge Daytona. Dixon then sold Hammer's car to a Toledo car dealer for $2,800.

On November 1, 1993, an Ottawa Hills police officer stopped Dixon for vehicle equipment violations while he was driving Hoffner's Chrysler Cordoba. When the officer discovered that Dixon did not have driving privileges, the officer impounded the car. During an inventory of Dixon's car, police found the ID card with Dixon's picture but Hammer's name, address, birth date, and Social Security number.

By November 8, 1993, police officers investigating Hammer's disappearance had located his Dodge Daytona at a used car lot in Toledo, had confirmed its unauthorized sale on September 30, and had identified Dixons as the prime suspect in the vehicle transaction. On November 9, Dixon was arrested and charged with forgery. Police, who did not advise Dixon of his Miranda rights, questioned him regarding the sale of Hammer's car. However, the primary interest of the police was not the sale of the car but Hammer's disappearance. During this interview, Dixon confessed to the auto title forgery but denied all knowledge of Hammer's disappearance.

Early on the afternoon of November 9, Hoffner led police to the location of Hammer's body. Dr. Cynthia Beisser, Deputy Coroner of

> Lucas County, performed the autopsy and concluded that Hammer had died of asphyxia. Dr. Beisser opined that Hammer had died within eight minutes of being buried and remained conscious during the first two to three minutes.
>
> After Hammer body was exhumed, police interviewed Dixon again [on November 9, 1993]. Police twice advised Dixon his Miranda rights. He signed a waiver-of-rights form and provided a tape-recorded account of the kidnaping, robbery, and murder of Hammer that reflects the facts already described.

*State v. Dixon*, 101 Ohio St. 3d 328, 328-30 (2004).

B. Interlocutory Appeal

The trial court originally suppressed Dixon's confession, due to the police's failure to obtain Dixon's waiver of his *Miranda* rights during both interviews on November 9, 1993. Ohio filed an interlocutory appeal to the Sixth Appellate District. The appeals court reversed the trial court's order that had suppressed evidence of statements that Dixon made in the second November 9, 1993, questioning. *State v. Dixon*, 101 Ohio App. 3d 552 (Ohio Ct. App. 1995). The suppression issue centered on two statements that Dixon made. In the first statement, made without the investigating officers advising Dixon of his *Miranda* rights, Dixon denied involvement in Hammer's murder. In the second statement, given after police advised Dixon of his Miranda rights and after he waived those rights,

Dixon gave statements incriminating himself. The Ohio Supreme Court described these interrogations:

> By November 8, 1993, police officers investigating Hammer's disappearance had located his Dodge Daytona at a used car lot in Toledo, had confirmed its unauthorized sale on September 30, and had identified Dixon as the prime suspect in the vehicle transaction. On November 9, Dixon was arrested and charged with forgery. Police, who did not advised Dixon of his Miranda rights, questioned him regarding the sale of Hammer's car. However, the primary interest of the police was not the sale of the car but Hammer's disappearance. During this interview, Dixon confessed to the auto title forgery but denied all knowledge of Hammer's disappearance. [] Shortly thereafter, [Detective] Kulakoski learned that Hammer's body had been discovered [after co-defendant Hoffner led police to the body and blamed Dixon for the murder]. As a result, Kulakoski and Detective Robert Leiter decided to question Dixon again. At approximately 7:30 p.m., Kulakoski and Leiter transported Dixon to the station. Prior to any questioning from police, Dixon volunteered that he had heard that police had found a body and asked whether Hoffner was in custody. After police told Dixon that Hoffner was not in custody, Dixon said, "I talked to my attorney, and I want to tell you what happened." Police then twice advised Dixon of his Miranda rights, and the second warning was tape-recorded. Dixon waived his Miranda rights, signed a waiver-of-

rights form, and gave a statement implicating himself and Hoffner in Hammer's death.

*Dixon*, 101 Ohio St. 3d at 329.

C. Indictment and Conviction

The grand jury indicated Dixon, Hoffner, and Wilkerson for the aggravated murder, kidnaping, and aggravated robbery of Hammer. Ohio charged Dixon with three alternative counts of aggravated murder. Count Nine charged Dixon with aggravated murder involving prior calculation and design pursuant to O.R.C. 2903.01(A). Count Ten charged Dixon with aggravated murder while committing kidnaping, and Count Eleven charged Dixon with aggravated murder while committing aggravated robbery, both pursuant to O.R.C. 2903.01(B). Ohio also indicted Dixon for kidnaping, aggravated robbery and three counts of forgery.

Each count of aggravated murder contained the same two death-penalty specifications under O.R.C. 2929.04(A)(7). The first specification charged aggravated murder during a kidnaping, while the second specification charged aggravated murder during an aggravated robbery.

The state trial court severed Dixon's case from co-defendant Hoffner's trial. Each had given statements that implicated each other. *Bruton v. United States*, 391 U.S. 123, 135-36 (1968) (Where a co-defendant's statement facially incriminates a defendant, the cases should be severed to avoid right of confrontation issues.)

The jury convicted Dixon as charged and recommended the death penalty. The trial court

sentenced Dixon to death for the murder, ten to 25 years in prison for each kidnaping and aggravated robbery conviction, and to 18 months in prison for each forgery offense. The trial court ran all the prison terms consecutively. As an aside, a different jury convicted Hoffner, recommended a death sentence and that judge also sentenced Hoffner to death.

D. Direct Appeal

On January 4, 1996, Dixon appealed to the Sixth District Court of Appeals. (Apx. Vol. 5, 17). With this appeal Dixon made fourteen (14) assignments of error. On November 17, 2000, the Sixth District Court of Appeals affirmed Dixon's conviction and sentence. *State v. Dixon*, 2000 Ohio App. LEXIS 5310 (2000). (Apx. Vol. 6, 251).

E. Appeal To Ohio Supreme Court

Dixon filed a Notice of Appeal to the Ohio Supreme Court on January 2, 2001. (Apx. Vol. 6, 298). The Ohio Supreme Court affirmed Dixon's conviction and sentence. *State v. Dixon*, 101 Ohio St.3d 328, 805 N.E.2d 1042 (2004). (Apx. Vol. 8, 237).

Dixon then filed a petition seeking a writ of certiorari in the United States Supreme Court on October 25, 2004. (Apx. Vol. 8, 237). On January 14, 2005, the United States Supreme Court denied the petition. (Apx. Vol. 8, 238).

F. State Habeas Action

On October 21, 1996, Dixon filed a Post-conviction Petition in the Lucas County Court of Common Pleas. With this state habeas action, Dixon

claimed that he had been denied his right to the effective assistance of counsel. ( Apx. Vol. 9, pg. 30.) On December 1, 1997, the Lucas County Court of Common Pleas denied the petition. (Apx. Vol. 10, pg. 165.)

On April 22, 1999, Dixon appealed the denial of his application for post-conviction relief to the Ohio Sixth District Court of Appeals. On November 17, 2000, the Ohio Court of Appeals affirmed the decision of the trial court. *State v. Dixon*, 2000 Ohio App. LEXIS 5310 (2000). The Ohio Sixth District Court of Appeals had consolidated the direct appeal and post-conviction appeal and addressed all issues in one opinion. (Apx. Vol. 6, pg. 251.)

On January 2, 2001, Dixon filed a Notice of Appeal to the Ohio Supreme Court seeking jurisdiction over an appeal regarding his state post-conviction petition. With his petition, Dixon alleged that an evidentiary hearing must be granted on a petition for post-conviction relief under Ohio law. On November 19, 2003, the Court declined jurisdiction to hear the appeal. (Apx. Vol. 11, pg. 70.)

G. Federal Habeas Action

The Petitioner initiated this federal habeas action on May 12, 2005. Dixon's habeas petition argues six grounds for relief:

> 1. Archie Dixon's due process right to a fair trial and right against self incrimination were violated when the State Court failed to suppress his confession in violation of his rights under the Fifth Amendment. U.S. Const. Amends V and XIV.

2. Archie Dixon's due process right to a fair trial was prejudiced by his trial counsel's deficient performance. U.S. Const. VI and XIV.

3. Archie Dixon's right against cruel and unusual punishment and his right to due process were violated because the Trial Court excluded relevant evidence intended to be introduced at the mitigation phase of the proceedings. U.S. Const. Amends. VII and XIV.

4. Archie Dixon's right against cruel and unusual punishment and his right to due process were violated because the Trial Court erred in its penalty-phase jury instruction regarding the aggravating circumstances that Dixon was found guilty of committing. U.S. Const. Amends. VII and XIV.

5. Archie Dixon's due process right to a fair trial was prejudiced by the Trial Court's instruction to the jury that it could assume Petitioner's guilt. U.S. Const. Amends. VII and XIV.

6. The Ohio death penalty law is in violation of Petitioner's rights under the U.S. Const. Amends. V, VI, VIII, IX and XIV.

[Doc. 18].

## II. Legal Standard

The Antiterrorism and Effective Death Penalty Act of 1996; Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), governs this Court's review of state court decisions. The AEDPA provides that

federal courts cannot grant a habeas petition for any claim that the state court adjudicated on the merits unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). *See also Miller v. Francis*, 269 F.3d 609, 614 (6th Cir. 2001).

The United State Supreme Court outlined the proper application of § 2254(d) in *Williams v. Taylor*, 529 .S. 362 (2000). To justify a grant of habeas relief under the "contrary to" clause, "a federal court must find a violation of law clearly established by holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision." *Miller*, 269 F.3d at 614 (internal quotations omitted) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)). Meanwhile, "under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 1523. The Sixth Circuit holds that, even if a federal court could determine that a state court incorrectly applied federal law, the court still could not grant relief unless it also finds that the state court ruling was unreasonable. *Simpson v. Jones*, 238 F.3d 399, 405 (6th Cir. 2000).

A violation of state law is not cognizable in a federal habeas action unless it amounts to a fundamental miscarriage of justice or a violation of

the right to due process in violation of the United States Constitution. *Floyd v. Alexander*, 148 F.3d 615, 619 (6th Cir.), *cert. denied*, 525 U.S. 1025 (1998). The Court accepts as valid a state court's interpretation of the statutes and rules of practice of that state. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Moreover, the factual findings of a state court are presumed to be correct. A federal court may only diverge from a state court's factual findings if the petitioner shows by clear and convincing evidence that the findings are erroneous. *See* 28 U.S.C. § 2254(e)(1).

## III. Analysis

### A. First Ground for Relief

With his first claim for relief, Dixon argues that Ohio violated Dixon's right to a fair trial and right against self-incrimination when the State Court failed to suppress his confession.

*1. Legal Standard*

The Fifth Amendment guarantees that "[no] person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. To protect a defendant's right against self-incrimination during a custodial interrogation, "the accused must be adequately and effectively apprised of his rights [to remain silent and to be represented by an attorney]." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). *Miranda* rights must be given "at the outset" of the interrogation. *Id.* at 467.

Police must give *Miranda* warnings only when a suspect is both in custody and is interrogated

during such custody. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation . . . Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will. . ."). After the police give the *Miranda* rights, the interrogation may proceed only if the defendant "[waives] effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* Otherwise, "[if] the individual [invokes his rights] in any manner . . . the interrogation must cease." *Id.* at 473-74. "[To invoke one's Miranda rights] requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, 501(C)3 U.S. 171, 178 (1991). If, after appraisal of his rights, the defendant makes a statement in the absence of his attorney, the government must "demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." *Miranda*, 384 U.S. at 475 (*citing Escobedo v. Illinois*, 378 U.S. 478, 490 n.14 (1964)).

"The Fifth Amendment prohibits use by the prosecution . . . of compelled testimony. A failure to administer Miranda warnings creates a presumption of compulsion." *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985). In cases where the defendant makes a custodial statement without *Miranda* warnings and the police subsequently explain his rights under Miranda before the defendant fully elaborates, the second statement may escape this presumption of

compulsion. In *Elstad*, the Court held that *Miranda* warnings ordinarily dissipate the taint of an initial Miranda violation and render a second confession admissible if the first confession was given voluntarily. Where police initially fail to notify a suspect of the suspect's Miranda rights, the state may still use later statements received after the suspect waived his Miranda rights. *Id.* at 318; *see also United States v. Johnson*, 351 F.3d 254, 263 (6th Cir. 2003) ("Even if the former statement were inadmissible, as obtained outside the strictures that the rule of *Miranda* places on custodial interrogations, the latter statement [after Miranda warnings were given] would still be admissible.")

Miranda warnings provide a prophylactic standard to safeguard the Fifth Amendment Privilege against compelled self-incrimination. While Miranda warnings serve to protect Fifth Amendment rights, they are not themselves constitutionally compelled. See *Elstad*, 470 U.S. at 308 ("Since there was no actual infringement of [Elstad's] constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun [v. United States*, 371 U.S. 471, 488 (1963)] that fruits of a constitutional violation must be suppressed."); *accord Michigan v. Tucker*, 417 U.S. 433, 445 n.19 (1974).

*2. Analysis*

I. Dixon's Second Statement was Not a Fruit of the Poisonous Tree

At trial, Ohio did not offer any testimony from the first statement that Dixon gave on November 9, 1993. As described, in his first statement, Dixon

denied any involvement in Christopher Hammer's murder. In arguing that statements made by Dixon in the second interview on November 9, 1993, 7:30 p.m. should be suppressed, Petitioner Dixon generally argues that his second statement was the fruit of the first, arguably illegal, statement. However, the Supreme Court has said that the exclusion of evidence as "'fruit of the poisonous tree' assumes the existence of a constitutional violation." *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). Thus, the doctrine does not apply to the "fruits" of statements obtained without Miranda warnings because those warnings, while serving to protect Fifth Amendment rights, are not themselves constitutionally compelled. *See Elstad*, 470 U.S. at 308 ("Since there was no actual infringement of [Elstad's] constitutional rights, the case was not controlled by the doctrine express in *Wong Sun* that fruits of a constitutional violation must be suppressed."); accord *Michigan v. Tucker*, 417 U.S. 433, 445 n.19 (1974).

In *United States v. Patane*, 542 U.S. 630 (2004), the Court reexamined *Elstad* after the Supreme Court's holding in *Dickerson v. United States*, 530 U.S. 428, 444, 120 S.Ct. 2326 (2002) where the Court held that Miranda announced a constitutional rule. In *Patane*, the Court examined whether a failure to give Miranda warnings required suppression of physical objects resulting from a suspect's unwarned but voluntary statements. In his plurality opinion, Justice Thomas reflected that *Elstad* refused to apply the "fruit of the poisoned tree" doctrine to voluntary statements taken without compliance with *Miranda*: "More generally, the *Miranda* rule 'does not require that the statements

[taken without complying with the rule] and their fruits be discarded as inherently tainted.'" 542 U.S. at 639, quoting *Elstad*, 470 U.S. at 307.

In his concurring opinion, joined by Justice O'Connor, Justice Kennedy also recognized that *Dickerson* did not undermine *Elstad*'s holding that a statement given after a sufficient Miranda warning need not be suppressed under the authority of *Wong Sun v. United States*, 371 U.S. 471, 488 (1963), though police had obtained an earlier statement after failing to give Miranda warnings.

The *Patane* dissent, authored by Justice Souter, similarly recognized that the failure to give *Miranda* warnings before a voluntary statement does not stop evidence before one individual after *Miranda* warnings are given: "[A] failure to give Miranda warnings before one individual statement does not necessarily bar the admission of a subsequent statement given after adequate warnings." 542 U.S. at 647 (citations omitted.)

On this issue, no sufficient evidence suggests that the Ohio Supreme Court came to a holding that violated any holding of the Supreme Court or unreasonably applied Supreme Court holdings to the facts of the prisoner's case. To the contrary, the Ohio Supreme Court's denial of Dixon's challenge on this issue is consistent with Supreme Court holdings.

II. The Totality of the Circumstances Indicate That Dixon's Confession was Voluntary

*Elstad* held that where an individual gives a second, warned statement the relevant inquiry is whether that statement was voluntarily made. *Elstad*, 470 U.S. at 318. In determining whether a

confession is voluntary, the Court assesses the "totality of the surrounding circumstances—both the details of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Such circumstances can include age, education, the length of detention, whether the accused has been informed of his constitutional rights, the repeated and prolonged nature of the questioning, and the use of physical punishment. *Id.* "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Elstad*, 470 U.S. at 310. "In these circumstances, a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible." *Id.* at 310-11. "The fact that a suspect chooses to speak after being informed of his rights is . . . highly probative [of voluntariness]." *Id.* at 318.

The Petitioner claims this case is controlled by *Missouri v. Seibert*, 542 U.S. 600 (2004). The Court stated that the issue in *Seibert* was "the admissibility of the repeated statement" where the police interrogators employed a systematic question-first strategy whereby officers intentionally refrain from reading Miranda rights until after they obtain a confession. The Court took the case to "[test] a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession." *Id.* at 604. The Court held that "[b]ecause this midstream recitation of warnings after interrogation and unwarned confession could

not effectively comply with Miranda's constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible." *Id.* at 604.

Contrary to the Petitioner's arguments, this case is not governed by *Seibert*. As the Respondent notes, *Seibert* was decided after the Ohio Supreme Court applied well established federal law in this case and affirmed the Court of Appeal's denial of the suppression. Furthermore, the facts, issue, and holding are distinguishable. *Seibert* only governs instances where police first obtain an unwarned confession, then warn the suspect, and then obtain a repeated confession. *Seibert* does not apply to this case, where the police never obtained an unwarned confession regarding Hammer's disappearance until after warning the Petitioner. The first interrogation session on November 9, 1993, ended with Dixon denying any knowledge regarding Hammer's disappearance. Not until after Hoffner led police to the body and four hours passed, did police return to pick up Dixon for the second interrogation. When police picked up Dixon, he stated that he wanted to tell them everything. He made this statement before any police questioning commenced. He also stated that he had spoken to his attorney who had advised him to tell the police everything. Then, the officers arrived back at the station, and the officers thoroughly explained his Miranda rights, which Dixon proceeded to knowingly and intelligently waive before Dixon admitted to any knowledge of Hammer's disappearance. Since Dixon never confessed to any knowledge before his warnings, *Seibert* does not control.

*Elstad*, however, does apply to Dixon's confession. Applying *Elstad*, the Court asks "whether an initial failure of law enforcement officers to administer warnings required by [Miranda], without more, 'taints' subsequent admissions made after a suspect has fully been advised of and has waived his Miranda rights." *Oregon v. Elstad*, 470 U.S. 298, 300 (1985). Police suspected Elstad, an 18 year-old young man, of burglarizing a neighbor's house. *Id.* Two officers went to Elstad's parents' house, where he lived, to arrest him. *Id.* While an officer was telling Elstad's mother why the police were there, another officer asked Elstad if he knew there had been a robbery. *Id.* at 301. Elstad replied "I was there." *Id.* At police headquarters one hour later, after arresting Elstad, the police read him his rights, he waived his rights, and then he gave a full statement, confessing to the crime. *Id.* The Supreme Court stated that a "rigid rule" should not determine the admissibility of the second statement. *Id.* at 317-18. "The relevant inquiry is whether . . . the second statement was also voluntarily made . . . the finder of fact must examine the surrounding circumstances and the entire course of police conduct . . . in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Id.* at 318. The Court found the confession admissible, holding "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given *Miranda* warnings." *Id.*

This Court's examination of the totality of the circumstances indicates that the Ohio Supreme

Court did not unreasonably apply *Elstad* to the Petitioner's case. The police officers advised Dixon of his rights, and Dixon waived them, before he admitted to any knowledge of Hammer's disappearance. As was the case in *Elstad*, a clear reading of Miranda warnings accompanied by waiver is highly probative of voluntariness. *Id.* Additionally, Dixon's personal characteristics indicate that he was not abnormally susceptible to being coerced in a custodial interrogations. Dixon had experience with the criminal justice system and knew how to invoke his Miranda rights. *See Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994). He invoked his rights on November 4, and he referred to that invocation on November 9 when he described to the officers how he had been "more than friendly" by answering their questions on that day.

Furthermore, the police did not subject Dixon to interrogation for an overly extended period of time. In the first interview on November 9, 1993, Dixon was at the police station for four hours though the police only interviewed him for 45 minutes. During that period, the interrogation did not focus solely on Hammer's disappearance but also covered Dixon's involvement with forgery. When police returned Dixon to the station, Dixon began confessing without repetitive or lengthy questioning. In *Ledbetter*, police began interrogating the suspect at 12:25 a.m., and continued until the suspect confessed at 3:00 a.m., and the court held police "questioned [him] for a reasonable amount of time." Id.

Moreover, the police did not physically punish Dixon, as is prevalent in many cases in which

confessions were suppressed. *See, e.g.*, *Reck v. Pate*, 367 U.S. 433 (1961). Here, the police offered Dixon refreshments and the opportunity to use the bathroom. No evidence of physical punishment appears in the record.

Courts also consider the time between interrogations and changes in the interrogators. In initially suppressing the confession, the trial court held that four hours was too short an amount time; however, the Ohio Supreme Court held that four hours was an adequate amount of time to dissipate any taint. The same interrogators participated in the two November 9, 1993 interrogations. While four hours is a relatively short period of time, and the presence of the same interrogators in the same location raises greater potential for coercion, the Ohio Supreme Court found these issues did not overcome other factors that indicated voluntariness. Most significant to this Court's review of the Ohio Supreme Court's ruling is that Dixon never confessed to any knowledge of Hammer's disappearance until after the police gave the Miranda warnings. Dixon has not shown that the Ohio Supreme Court incorrectly applied clearly established federal law.

III. Dixon's Invocation on November 4 Could Not Have Effect on November 9

In the event that an "individual states that he wants an attorney present, the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. The accused cannot be "subject to further interrogation by the authorities until counsel has been made available to him, unless the accused

himself initiates further communication." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). "If police subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible." *McNeil*, 501 U.S. at 177.

If the police release the suspect, but later return the suspect to custody after some period, the prior invocation no longer precludes official interrogation. *Id.* "We have in fact never held that a person can invoke his [Miranda] rights anticipatorily, in a context other than 'custodial interrogation.'" *Id.* at 182 n.3. Otherwise, "there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect." *Id.* Nevertheless, upon returning the suspect to custody, the police must again advise him of his rights, and the suspect may invoke his rights anew.

Dixon contends that since he invoked his right to have an attorney present on November 4, 1993, the Ohio courts should have suppressed his confession on November 9, 1993 because it occurred without his attorney present. It is well settled that once the accused invokes his right to counsel, the interrogation must cease until an attorney is present. *See Miranda*, 384 U.S. at 474. Further, when the accused makes incriminating statements due to subsequent police questioning in disregard of this rule, the prosecution may not use the statements at trial. *See McNeil*, 501 U.S. at 177. These rules only operate to suppress statements made in (1) a custodial setting; and (2) where there has been no

break in custody between the accused's invocation and the subsequent questioning initiated by the police. *Id.* Given that Dixon experienced several days of freedom between his November 4, 1993 invocation and his November 9, 1993 confession, Dixon's invocation of his right to counsel on November 4 does not stop the interrogations on November 9. This is true regardless of whether Dixon was in custody on November 4th.

Dixon was not in custody on November 4, when he freely went to the Sylvania Township Police Department to arrange for the release of his impounded car. Officers at the department, who were investigating Hammer's disappearance, knew that Dixon had been an acquaintance of Hammer's and asked to speak to Dixon. Since he was not in custody, the officers were not required to provide Dixon with Miranda warnings. In an abundance of caution, the police read him his rights anyway. Dixon then refused to answer any questions without his attorney present and left the police station without further communication with the officers.

Officers never placed Dixon in custody at any point during his November 4, 1993 visit to the Sylvania Township Police Department. Dixon freely walked into the station, the officers did not arrest him or restrict his freedom of movement. Indeed, when Dixon decided not to speak with the officers, he freely walked out of the station. Since Dixon was not in custody on November 4, he could not anticipatorily invoke his Miranda rights to take effect at some indefinite moment in the future. *See id.* at 182 n.3.

Even assuming, *arguendo*, that Dixon was in custody on November 4, 1993, his request to have

counsel present still does not prevent the November 9, 1993 interrogations because Dixon was free in the interim. Because a significant break in any custody had occurred between the interrogations on November 4 and November 9, Dixon's request for counsel on November 4 was irrelevant to the interrogations on November 9. *See id.* at 177.

Alternatively, Dixon contends that a comment he made during the morning interrogation on November 9, 1993, in which he referenced the encounter with the Sylvania Township police on November 4, 1993, should be considered a new request for counsel. In responding to questions about Hammer's disappearance during the November 9, 1993 interview, Dixon said:

> That is understandable, but everything I know I've already told you. I've been more than welcome to tell you. I mean usually, like I told you, you can ask this gentlemen right here cause (inaudible), I didn't even want to speak with you guys unless I had an attorney present because that eight months I did I talked to an attorney; told my side, I spent eight months for something I never did so I had no faith in the system anymore. But yet I still, like just now told you everything I know, admitted to the forgery."

Dixon claims that this statement was a new invocation of his right to have an attorney present. As such, he argues that his confession should have been suppressed because the police officers violated his constitutional right against self-incrimination when they continued to question him.

The Respondent argues in his sur-reply that Dixon's claim that this statement was a new invocation is barred under AEDPA because it is a Sixth Amendment, and not a Fifth Amendment, claim. This is not persuasive. Dixon's statement did not again ask that questioning stop until counsel was present, instead it described having earlier declined to speak with police. Moreover, an invocation concerns the Fifth Amendment where, as here, a defendant was not under indictment but invoked the right to counsel after he had been *Mirandized*. *See, e.g.*, *Edwards v. Arizona*, 425 U.S. 477, 480 n.7 (1981) (finding Edward's invocation implicated his Fifth Amendment rights and declining to consider whether it violated the Sixth Amendment).

Nevertheless, the Court does not find Dixon's statement was a new invocation of his Fifth Amendment right to counsel. Dixon cites a recent Sixth Circuit case, *Van Hook v. Anderson*, 488 F.3d 411 (6th Cir. 2006), to support his argument; yet *Van Hook* merely follows *Miranda* and its progeny, holding that police interrogation must cease when the accused invokes his right to counsel. The Ohio courts found that Dixon's statement could not reasonably be construed as a new invocation of his right to have an attorney present during the November 9, 1993 interrogation because the comment was too vague to be understood as a new invocation. *See Davis v. United States*, 512 U.S. 452 (1994) (requiring a clear and unambiguous invocation). Rather, Dixon's comment appears to be nothing more than support for Dixon's short-lived position that he knew nothing about Hammer's disappearance. This Court finds the Ohio Supreme court's determination that Dixon's November 9,

1993, remark was not a request for counsel was a reasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

The Court finally finds that the Petitioner has made a sufficient showing of denial of a constitutional right on this claim to issue a certificate of appealability on the introduction of this confession. 28 U.S.C. § 2253; Fed. R. App. R. 22(b).

**B. Second Ground for Relief**

With his second ground for relief, Dixon argues that he was denied the effective assistance of counsel. He argues his counsel was ineffective at both the guilt and penalty phase of his trial. He cites a number of alleged deficiencies.

*1. Evidentiary Hearing*

On October 26, 2007, this Court held an evidentiary hearing on this issue. 28 U.S.C. § 2254(e)(2) limits such hearings where "the applicant has failed to develop the factual basis of a claim." The test for "failed to develop" is a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel" in his or her attempts to discover and present a claim in the state court. *Williams*, 529 U.S. at 432; *McAdoo v. Elo*, 365 F.3d 487, 500 (6th Cir. 2004). Under § 2254(e)(2), diligence depends upon "whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in the state court." *Williams*, 529 U.S. at 435; *see also Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001) (remanding for an evidentiary hearing where prisoner had presented claims to Ohio courts and

Ohio courts had refused the hearing); *McAdoo*, 365 F.3d at 500 ("when a defendant diligently seeks an evidentiary hearing in the state courts in the manner prescribed, but the state courts deny him that opportunity, he can avoid § 2254(e)(2)'s barriers to obtaining a hearing in federal court").

In this case, Dixon diligently sought an evidentiary hearing in the state courts. (Apx. Vol. 9, 30) (Motion for post-conviction relief in trial court, asking for an evidentiary hearing); (Apx. Vol. 10, 7) (supplemental exhibits); (Apx. Vol. 5, 169) (appeal from denial of motion, alleging error for failure to grant an evidentiary hearing); (Apx. Vol. 11, 3) (appeal to the Ohio Supreme Court, alleging error for failure to grant an evidentiary hearing.) The Respondent argues that Dixon was not diligent because he did not submit affidavits of his attorneys with his request for an evidentiary hearing. The Court does not read the diligence requirement so narrowly. The Petitioner applied to the state court for an evidentiary hearing, and he argued that his counsel had been ineffective and submitted affidavits from the mitigating specialist, among others, about various things that he alleges were deficient performance and could not have been strategic. The Court finds this sufficient to meet the diligence test. *See, e.g.*, *Greer*, 264 F.3d at 681.

"In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1933 (2007). In deciding whether to grant an evidentiary hearing, a federal

court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. *Id.* at 1940. In this case, Dixon alleged that his counsel failed to introduce mitigating evidence and failed to have a mitigation strategy session with he psychologist and the mitigation specialist. He alleges the attorney had no strategic reason for the failures and that they prejudiced him. If this were true, it could entitle the Petitioner to relief. *See, e.g.,* *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000). The Petitioner further alleges that his counsel had no strategy in their failure to cross-examine witnesses. These claims, too, could entitle the Petitioner to relief. *See, e.g.*, *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997). The Court, therefore, granted the hearing, and considers that testimony below, where appropriate.

*2. Legal Standard for Ineffective Assistance that the Ohio State Courts Used – Strickland*

The Supreme Court outlined the test governing claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). The benchmark for any such claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

A claim of ineffective assistance of counsel has two components: a petitioner must show (1) that his counsel's performance was deficient; and (2) that he was prejudiced by that deficient performance. *Id.* at 687. To show deficiency, a petitioner must demonstrate that "counsel made errors so serious

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The ABA standards for counsel in death penalty cases provide the standard to be used to define the prevailing professional norms. *Hamblin v. Mitchell*, 354 F.3d 482, 486-88 (6th Cir. 2003).

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. When assessing prejudice, the reviewing court must weight the evidence in aggravation against the totality of available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

"Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687. The reviewing court need not address both components of an ineffective assistance of counsel claim if the petitioner makes an insufficient showing of one component. *Id.* at 697. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* Rather, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

*3 Petitioner's Grounds for Ineffective Assistance*

The Petitioner alleges his counsel was ineffective for a) failing to cross-examine key witnesses in the trial and b) for failing to present relevant mitigating evidence to the jury during the penalty phase. At trial, Dixon's counsel failed to cross-examine several key witnesses. Dixon put on no case-in-chief and his counsel only cross-examined three of the state's fifteen witnesses. In particular, his counsel failed to cross-examine Kirsten Wilkerson, who had received a plea bargain in exchange for her cooperation and had told varying versions of the facts in the days after the murder. His counsel also did not cross-examine the detective who investigated the murder.

In his investigation for the mitigation phase of Dixon's trial, Dixon's counsel engaged both a mitigation specialist and a psychologist. The mitigation specialist found the following. Records from the Ohio Department of Youth Services indicated that Dixon came from a dysfunctional family: "Parental rules and consequences had been inconsistent and minimal for years. [ ] Sandy [Dixon's sister] stated that her brother, Archie James Dixon, had frequently hit her over the years. She indicated that he actually pounded her and frequently called her a slut and a whore and that she was afraid of her brother." "Officials wrote that it appeared that the family background was one filled with long-standing dysfunction. The parents have had significant unruly and criminal problems with their son, Archie James Dixon and Mrs. Dixon spoke

of having an ongoing conflict with her daughter, Sandy, for years." (Apx. Vol. 9, 170-71).

During Dixon's childhood, his father was an alcoholic, his mother also "had a drinking problem as well." (Apx. Vol. 9, 172). Dixon described "a very dysfunctional early childhood and reported that his father was chemically dependent and was a very aggressive person. He recalled a number of beatings he received from his father" although he also reported that his father had stopped drinking and had stopped physical confrontations four years before the murder. (Apx. Vol. 9, 196).

Dixon's father worked as a crane operator. He drank heavily after work and was arrested numerous times for driving while intoxicated. When drunk, Dixon's father could be aggressive towards his family. As described by Dixon's mother: "while her husband drank, she related that she and her family were afraid of her husband but that fear subsided when he sobered up. When he was drinking, she related that 'you do not mess with dad' because dad would physically get very violent." (Apx. Vol. 9, 172).

Dixon's mother indicated Dixon had physical altercations with his father, she did not know how many times. There was one instance when Dixon's father put on steel-toed boots and kicked Dixon "like a man"; one of Dixon's ribs is deformed as a result. (Apx. Vol. 9, 172). In another instance, Dixon's father struck him in the face sufficient to leave a hand print where his father smacked him. (Apx. Vol. 9, 173). Since Dixon's father stopped drinking a few years before Dixon's trial, he hasd not hit anyone in his family, but continuesd to vent his anger on inanimate objects. (Apx. Vol 9, 173).

The family had a history of sexual problems. Dixon's maternal grandfather apparently molested Dixon's sister for years. (Apx. Vol. 9, 171). Dixon, his brother and his sister apparently played strip pool together. Dixon's sister, Sandy, reported that Defendant Dixon raped her when she was 10 or 11 years of age. (Apx. Vol. 9, 171). When Dixon was 13 and his sister was 9, Dixon's mother found them naked in bed. Separately, Dixon committed Gross Sexual Imposition on a 4 year-old neighbor child shortly thereafter. (Apx. Vol. 9, 175).

After Dixon committed Gross Sexual Imposition on a 4-year old child, he was placed in foster care for 18 months with the Wolfes, social workers who have worked with wayward kids since 1975. (Apx. Vol. 9, 181). Mrs. Wolfe indicated that she felt she had made progress with Dixon but she witnessed a major backslide as soon as the court decided to release him back to his parents. The Wolfes thought this may have been related to the anxiety of going home again. (Apx. Vol. 9, 183). Mrs. Wolfe indicated that Dixon had a terrific sense of humor and that he was a bright, capable person with a good work ethic. (Apx. Vol. 9 184).

Finally, a report of Psychological Evaluation from Lucas County Schools indicated that Dixon's mother had several complications with him during pregnancy and he had a history of high fevers, was hospitalized for pneumonia and possibly Reyes Syndrome. Dixon hit all normal development milestones after this hospitalization. (Apx. Vol. 9 at 169).

His counsel hired a psychologist, Dr. Christopher Layne, in an attempt to buttress

mitigation arguments. Dr. Layne scored Dixon's intelligence as low-normal on an IQ test. Dr. Layne found that Dixon had a criminal personality, Anti Social Personality Disorder: "I found that Mr. Dixon – essentially had no psychological reasons to do what he did, and conversely, I found that his personality was basically a criminal personality, called an Antisocial Personality Disorder." (Tr. 67). Dr. Layne told Dixon's attorney: "I told Scalzo [Dixon's attorney] I'm just not going to be helpful." (Tr. 69).

Dr. Layne knew that Dixon's medical records had indicated possible Reyes Syndrome as a child. However, Layne did not find any symptoms of Reyes Syndrome and he did not give Dixon the neurophyschological battery of test that he would have given to test for brain damage. He reasoned that Dixon did not exhibit any of the primary symptoms of brain damage, such as memory loss or difficulty learning. (Tr. at 82). Based on this investigation and findings, Dixon's attorney told Dr. Layne not to complete his report.

None of the evidence of Dixon's family background came before the jury at the penalty phase. Instead, his counsel only introduced his birth certificate and put on testimony that indicated he would not be eligible for parole for quite some time.

a. Failure to Cross-Examine Witnesses – Counsel's Performance

Dixon claims his counsel was ineffective for failing to cross-examine witnesses. Dixon's trial counsel only cross-examined three of the state's fifteen witnesses. Dixon asserts that only eight pages of cross-examination occur in the 364 pages of

trial transcript. Also, the defendant did not present any evidence in its own case-in-chief.

In rejecting his claim, the Ohio Supreme Court found that "[e]xperienced counsel would realize that any attempt to cross-examine these witnesses would have merely reemphasized their damaging testimony." *State v. Dixon*, 101 Ohio St.3d at 337. Dixon claims his attorneys could have effectively cross-examined witnesses without reemphasizing the damaging nature of their testimony had the attorneys focused on Dixon's principal offender status.

Dixon also alleges that the cross-examination of the three witnesses that his counsel did examine was not a reasonable trial strategy. Specifically, trial counsel cross-examined the victim's girlfriend and his mother, in an attempt to diffuse juror sympathy for the victim and paint the victim as a bad character.

Further, trial counsel cross-examined Detective Kulakoski only about the proximity of the victim's body to Michigan. The Ohio Supreme Court described this as an attempt to suggest the arbitrariness of the death penalty- Michigan does not have a death penalty. *Id.* at 337. But, as Dixon points out, jury mollification is not an appropriate defense.

The Ohio Supreme Court considered these arguments and found that they were reasonable trial tactics. "The extent and scope of cross-examination clearly falls within the ambit of trial strategy, and debatable trial tactics do not constitute lack of effective assistance of counsel." *Id.* at 337. The

Court finds that the Ohio Supreme Court's decision was an unreasonable application of *Strickland*. Specifically, Dixon's counsel was deficient in his failure to cross-examine Kirsten Wilkerson and Detective Kulakosi. These arguments merit a full discussion, below.

I. Wilkerson

Wilkerson gave conflicting statements to the police. She first stated that she was not involved in the crime, and later acknowledged she had helped Hoffner and Dixon. In her second statement to the police, she could not recall who had done precisely what to Hammer. With that statement, she stated that co-defendant Hoffner had earlier said he was angry with Hammer and wanted to get his insurance money. She could not recall who had said what during the struggle, and did not know who had discussed digging the grave. She stated both Hoffner and Dixon had taken Hammer's social security card and birth certificate.

At trial, Wilkerson did not testify about Hoffner's involvement nor did Dixon's counsel ask her questions. Her testimony was much more specific than her earlier statements, and she testified that Dixon admitted that he had tried to hit Hammer in the head with a bottle. On three prior occasions, she had failed to tell the police about Dixon's statement. Moreover, she had agreed to testify after Ohio agreed to reduce her aggravated murder charges to kidnaping.

The Respondent Warden argues that declining to cross-examine Wilkerson could have been a reasonable trial strategy. According to the

Respondent, Dixon's own statement so closely tracks Wilkerson's version of events that any impeachment would have been ineffective. The Petitioner responds that while his version of events was similar to Wilkerson's description, Wilkerson's testimony regarding who took the lead as between the Petitioner and Hoffner was very damaging and should have been challenged. Dixon argues that trial counsel should have challenged Wilkerson's testimony that the Petitioner had told Wilkerson to drive to the grave site, and that the Petitioner, not Hoffner, had taken the identification documents. Dixon does not challenge Wilkerson's statements about Dixon's involvement. Instead, Dixon says his trial counsel should have tried to develop her testimony to support an argument that the Petitioner was not the "actual killer."

The Ohio Court of Appeals examined this question with the benefit of Wilkerson's earlier statements. They noted that "[she] was an eyewitness to most of the horrible and violent events leading up to Hammer's murder and her testimony at trial was clear, unequivocal and highly incriminating to appellant." *State v. Dixon*, 2000 Ohio App. LEXIS 5310 (Ohio Ct. App. Dec. 6, 2000). "The potential usefulness of any questioning that may have stemmed therefrom is arguable at best and, in this court's opinion, is a matter that was best left to the discretion of trial counsel." *Id.* at *54. Cross-examining her "would have prolonged her presence in front of the jury and given additional and damaging emphasis to the story which she told. The decision not to cross-examine this witness clearly was a matter of trial tactic." *Id.* at *55.

At a hearing before this Court, the Petitioner's trial counsel testified that he had determined that any questions he would have asked would not have been helpful to Dixon. [Tr. 37-38]. Attorney Geutedner further testified that he knew Wilkerson had made separate statements to the police but did not cross-examine her because he was unsure he would have liked her answers. [Tr. 38]. Attorney Scalzo testified that Attorney Geutedner was in charge of the trial phase. [Tr. 116-18]. Attorney Scalzo also testified that he was sick about the "sweetheart deal" that Wilkerson got in exchange for her testimony. [*Id.*]

The Court finds that Ohio's decision was an unreasonable application of *Strickland*. In *Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2000), the Sixth Circuit found the trial counsel's failure to cross-examine the key witness had been deficient performance. Counsel had stated he did not cross-examine the witness because he knew everything the witness had to say and he could already see that he was going to fail with the cross examination. In that case, like here, the attorney had grounds to attempt to impeach the key witness but was unprepared at trial. *Id.* at 633. The Sixth Circuit found no tactical reason for his failure to cross-examine the witness. *Id.*

The attorney's failure to cross-examine Wilkerson was similarly deficient. At trial, Wilkerson stated no promises were made to her regarding her testimony – only that her aggravated murder charge was reduced to kidnaping. At the very least, it would have been unreasonable to press her on this point or question her on the penalty she

faced if she did not accept the state's proffered deal. "The exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Lewis v. Wilkinson*, 307 F.3d 413, 419 (6th Cir. 2002). Counsel's failure to question Wilkerson on the apparent advantage she received for her testimony could not have been for a tactical reason. There is no tactical reason to not get the full extent of Wilkerson's potential plea bargain before the jury. Wilkerson faced the death penalty had she not taken the plea bargain.

The Ohio appellate court found the failure to cross-examine Wilkerson was reasonable. The Court stated "Wilkerson was an eyewitness to most of the horrible and violent events leading up to Hammer's murder and her testimony at trial was clear, unequivocal and highly incriminating to appellant. For defense counsel to have cross-examined her would have prolonged her presence in front of the jury and given additional and damaging emphasis to the story which she told." *Dixon*, 2000 Ohio App. LEXIS 5310 at *54. Wilkerson, however, was also a co-defendant and a culpable party to the murder who had been offered a greatly-reduced sentence to testify.

II. Detective Kulakoski

The Petitioner also asserts that his trial counsel should have cross-examined Detective Kulakoski to solicit testimony regarding arguably exculpatory statements that Dixon gave Kulakoski. According to Dixon, the statements he gave Kulakoski would support a defense that Hoffner had played a more significant role in the murder. Dixon

allegedly told Detective Kulakoski that Hoffner had questioned the victim about the insurance proceeds and had stated he wanted to steal those proceeds. Dixon told Kulakoski that he had refused to go along with Hoffner's plan about stealing the proceeds. Further, Dixon told Detective Kulakoski that Hoffner had Hammer in a headlock and Dixon told Detective Kulakoski that he was afraid of Hoffner. Finally, the Petitioner asserts that his counsel should have asked questions to develop Dixon's statements that Hoffner had jumped on the dirt and filled in the grave.

The Respondent asserts that the Petitioner's trial counsel's cross-examination of Detective Kulakoski on the sole issue of where the police found the body was a strategic decision to prepare the jury for mitigation. Detective Kulakoski was the last witness to testify in the guilt phase; the penalty phase of the trial was imminent. Trial counsel attempted to highlight the arbitrariness of the death penalty to the jury by emphasizing how the police found the victim's body close to the Michigan border, and that Michigan does not sentence people to death.

It is unclear whether Detective Kulakoski could have testified as to what Dixon said to the Detective even if Dixon's counsel had solicited such testimony. Any such testimony would have been hearsay. Dixon now seeks to offer evidence of his own statement, a statement given at a time when the prosecutor was unable to cross-examine him. See Ohio R. Evid. 801(C) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). As the testimony would have been solicited by Dixon, it would not be

excepted from the prohibition against hearsay as a statement offered against a party. See Ohio R. Evid. 801(D)(2) ("A statement is not hearsay if: (2) The statement is offered against a party and is (a) the party's own statement"). Stated otherwise, under Ohio evidence law, Dixon's statement to Detective Kulakoski was hearsay and not admissible. The failure of Dixon's trial counsel to offer such evidence was not ineffective.

Even if they could have offered such evidence, however, the Court finds counsel's failure to cross-examine Detective Kulakoski was not deficient. The Ohio Supreme Court found this a tactical decision that was reasonable representation. The Court agrees. The Ohio Supreme Court applied *Strickland*'s test for ineffective assistance. Under AEDPA, this Court cannot find Dixon's counsel's performance deficient under *Strickland* unless the Ohio Supreme Court's decision was an unreasonable application of *Strickland*. *See* Simpson v. Jones, 238 F.3d 399, 405 (6th Cir. 2000). The Court agrees with the Ohio Supreme Court that further cross-examination about the statement could have made things worse for their case. Because Detective Kulakoski knew many gruesome facts about the crime, keeping his testimony as short as possible was a reasonable tactical decision.

b. Failure to Cross-Examine Witnesses – Prejudice

The Respondent asserts that even if the above failures of counsel had been deficient performance, the Petitioner cannot show prejudice. The Respondent argues that any testimony that might have been obtained from Wilkerson or Detective

Kulakoski to paint co-defendant, Timothy Hoffner, as the principal offender would have been futile.

Ohio law allows for more than one principal offender. *See State v. Keene*, 81 Ohio St. 3d 646, 655 (1998) ("There can be more than one actual killer—and thus more than one principal offender—in an aggravated murder.")

The Respondent thus says that Dixon received the death penalty on grounds independent to the principal offender issue. The Respondent argues the jury alternatively found that Dixon acted "with prior calculation and design" which is "a scheme designed to implement the calculated decision to kill." *State v. Cotton*, 56 Ohio St.2d 8 (1978). The Ohio Supreme Court found, however, that the jury unanimously found Dixon guilty of both specifications. *State v. Dixon*, 101 Ohio St. 3d 328, 343 (2004).

For that reason, the Court does not see how the counsel's alleged deficiencies in regard to Detective Kulakoski or Wilkerson could have prejudiced the Petitioner. Even had Dixon's counsel successfully convinced the jury that Dixon was not the "actual killer," the jury also unanimously found Dixon acted with "prior calculation and design." Trial counsel's failure to cross-examine witnesses to establish that he was not a principal offender, even if this could have been shown, did not prejudice the Petitioner.

Finally, the Court finds that the Ohio Supreme Court's finding that the Petitioner could not demonstrate prejudice was reasonable. On this point, the Ohio Supreme Court stated "even if defense counsel were deficient in failing to impeach

Wilkerson, we find no prejudicial error in view of the overwhelming evidence of guilt." *Dixon*, 101 Ohio St. 3d at 338. This finding was reasonable. Ohio had plenty of evidence of Dixon's guilt and an impeachment of Wilkerson would not have altered the outcome of the guilt-phase of the trial.

c. Failure to Present Mitigating Evidence Performance

Dixon argues his trial counsel should have presented evidence in mitigation beyond evidence on the amount of time the Petitioner would serve if he were to serve a life sentence. Specifically, the Petitioner argues his trial counsel should have called the Petitioner's older brother, his mother, David Lewis, and Nancy and Bob Wolfe as witnesses. Further, the Petitioner argues that trial counsel should have presented evidence on his family history to the jury. That history included some evidence suggesting domestic violence, sexual abuse, physical aggression, possible incest, chronic alcoholism, and poor role models. He argues that trial counsel should have had Dixon evaluated for neuropsychological problems, and that trial counsel should have had Dixon's brain development evaluated.

The Respondent answers that had Dixon's counsel presented evidence of Dixon's history and background, the court would have allowed the prosecution to offer evidence of Dixon's bad character. This could have included evidence regarding Dixon's conviction for Gross Sexual Imposition of a four-year-old child. The prosecutor could potentially have used evidence that Dixon raped his sister as well as struck his sister.

Petitioner Dixon first presented this claim on direct appeal to the Ohio Supreme Court. That Court found it could not look outside the record before it and could not consider the fifty-one page mitigation specialist report and affidavits that were not made part of the record until post-conviction. Given the limited evidence before the Ohio Supreme Court, it denied the claim on direct review.

Dixon renewed the claim in state post-conviction proceedings. The Ohio Sixth District court of Appeals was the highest court to provide a reasoned decision after considering the mitigation specialist report and affidavits. *See State v. Dixon*, 2000 Ohio App. LEXIS 5310 (Ohio Ct. App. Nov. 17, 2000). After appropriately applying the *Strickland* standard, the Ohio appellate court denied the claim:

> We find, however, that appellant failed to establish that counsel was deficient in not presenting the information contained in Ericson's report and in not calling the individuals mentioned above to testify or that the defendant was prejudiced by counsel's actions. See *Bradley, supra*. In addition, appellant has not demonstrated a reasonable probability that the result of the trial would have been different had the mitigation report been used. See *Strickland, supra*. As such, appellant has failed to establish the existence of substantial grounds for relief on the basis of ineffective assistance of counsel.

*Id.*

In death penalty cases, trial counsel have an obligation to conduct a full investigation of their

client's background. *Williams v. Taylor*, 529 U.S. 362, 396 (2000). The court must focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of the defendant's background was itself reasonable. *Wiggins*, 539 U.S. at 523; *Harris v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005). Further, the Court must consider whether the known evidence would have lead a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 527; *Bigelow v. Williams*, 367 F.3d 562, 574 (6th Cir. 2004). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

In determining if trial counsel was deficient at the mitigation phase, "[the test is] whether the investigation supporting counsel's decision not to introduce mitigation evidence of background was itself reasonable." *Lundgren v. Mitchell*, 440 F.3d 754 (2006). Where counsel did conduct a significant investigation relevant to the sentencing phase, the court must examine the specific facts of the case, including any decisions or instructions by the defendant that may have hindered counsel's preparation. *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001). Counsel's performance cannot be said to have fallen below an objective standard of reasonableness simply because counsel followed leads that ultimately led nowhere. *Lorraine v. Coyle*, 291 F.3d 416, 436-39 (6th Cir.,) *amended on reh'g*, 307 F.3d 459 (6th Cir. 2002) (counsel was not ineffective because he actually pursued lead regarding the petitioner's possible organic brain damage and no medical proof was ever found that the petitioner suffered from such a condition).

1. Psychological Factors

The Petitioner's trial counsel hired Dr. Christopher Layne with the hope that he would find that the Petitioner had neurological damage. [Tr. 108]. Specifically, Layne reviewed Dixon's medical records that indicated that Dixon possibly suffered from Reyes Syndrome when he was about five or six years old. Unfortunately for Dixon, Dr. Lane for no history suggesting that this possible illness resulted in organic brain injury or condition in September, 1993: "I found that Mr. Dixon—essentially had no psychological reasons to do what he did, and conversely, I found that his personality was basically a criminal personality, called an Antisocial Personality Disorder. That would not he helpful in his trial; in fact, it would probably have been harmful." [Tr. 67-68]. Attorney Scalzo knew that Dr. Layne found no indicating of neurological damage. [Tr. 110-11]. Attorney Scalzo had earlier engaged in extensive strategy discussions with Dr. Layne, attempting to use Dr. Layne's diagnosis to his advantage. [Tr. 86-87; 109].

In post-conviction proceedings after Dixon was sentenced to death, the Ohio Court of Common Pleas received evidence that another doctor, Dr. Eisenberg, reviewed the report prepared by Dr. Layne, and then recommended that the Petitioner be tested for neurological damage. The Ohio court, however, did not find this evidence sufficient to require additional evidence in the Petitioner's state habeas claim. *See* Apx. Vol. 10, p. 170. Further, it found counsel's failure to present psychological evidence was a tactical decision. The Ohio court of appeals affirmed

this decision. *State v. Dixon*, 2000 Ohio App. LEXIS 5310 (Nov. 17, 2000).

Petitioner Dixon also argued that Attorney Scalzo and Dr. Layne did not do a reasonable investigation of potential brain injury to Dixon. But, as Dr. Layne testified, Dixon did not present with any symptoms of brain damage, nor did he have a history that suggested brain damage. He had possibly had Reyes Syndrome when he was a young child that *could* have led to brain damage. But after suffering this possible Reyes Syndrome at age six, Dixon did not have any clinical signs of resulting brain damage, such as any dramatic change in behavior. [Tr. 89]. Dr. Layne further testified he administered an IQ test to the Petitioner that did not reflect brain damage. [*Id.*].

The Court concludes that trial counsel's investigation into possible brain damage was reasonable. Attorney Scalzo hired Dr. Layne specifically hoping that Dr. Layne would find brain damage. [Tr. 108]. He did not, and the investigation was reasonable. Counsel pursued this avenue for mitigation as far as was reasonable. *See* Coyle, 307 F.3d at 459.

Further, in the Petitioner's post-hearing brief, he concedes that calling Dr. Layne to testify regarding the Petitioner's psychological condition would have led to Dr. Layne testifying about his diagnosis of antisocial personality disorder and would likely have led to testimony regarding his conviction of Gross Sexual Imposition. "If Petitioner had called Dr. Christopher Layne to testify that Dixon suffered from antisocial personality disorder, then Dixon's background, including his criminal

history, could have been brought up in cross examination as background information which Layne used in forming his opinion." [Doc. 77, p. 4-5]. This accords with the Ohio Supreme Court's rulings that prosecutors can explore the parameters of the defense's mitigation evidence in cross examining a psychologist. *See State v. Green*, 90 Ohio St.3d 352 (2000) (approving prosecution's questions of a defense psychologist asking if the antisocial personality disorder classification also encompassed psychopaths and sociopaths).

This Court finds that the Ohio appellate court reasonably found that Attorney Scalzo's representation regarding calling Dr. Layne was not deficient. Attorney Scalzo made a strategic decision not to call Dr. Layne, and that strategic decision was not deficient performance. As he testified, Dr. Layne would likely have helped the prosecution. [Tr. 111]. At the hearing before this Court, Dr. Layne even stated that Dixon was "sadistic" and "evil." [Tr. 90, 95]. It is clear his testimony would not have helped.

2. Social History

Counsel's decision not to present the mitigating evidence about the Petitioner's social history was not reasonable. Specifically, the Petitioner's father was an alcoholic and abusive when drunk. On at least two occasions, Dixon's father violently struck Dixon. Dixon's family was dysfunctional. His grandfather raped his sister. Dixon himself raped his sister and was convicted of gross sexual imposition of a four-year-old neighbor.

The mitigation specialist Erickson identified the following people who would have testified on

Dixon's behalf during the penalty phase: a wrestling coach, a pastor, Dixon's mother, Dixon's brother, and his foster parents the Wolfes. Neither Attorney Scalzo nor Attorney Geutedner recalled ever speaking to them regarding their testimony. [Tr. at 128].

Pursuant to O.R.C. § 2929.03(D)(1), "the prosecutor, at the penalty stage of a capital proceeding may introduce any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing" and may "rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false. *State v. DePew*, 38 Ohio St.3d 275, 282, 285 (1988). In *DePew*, the Ohio Supreme Court emphasized that "[t]his [rebuttal] right is limited, however, to those instances where the defense offers a *specific assertion*, by a mitigation witness or by the defendant, that misrepresents the defendant's prior criminal history." *Id.* (emphasis added). Dixon's criminal background and prior bad acts were not relevant to the aggravating circumstances here—that he committed aggravated murder by being the principal offender (1) in the court of a robbery, and (2) in the court of a kidnaping—and that he committed these acts with prior calculation and design. *Dixon*, 101 Ohio St. 3d at 342. But evidence of good character during the sentencing phase could, but would not necessarily have opened the door to rebuttal evidence of prior crimes of violence. *State v. Jalowicz*, 91 Ohio St.3d 220 (2000).

Defendants have "a right—indeed, a constitutionally protected right—to provide the jury

with the mitigating evidence that their trial counsel either failed to discover or failed to offer." *Terry Williams v. Taylor*, 529 U.S. 362, 393 (2000). Trial counsel's failure to conduct "a reasonable investigation of a defendant's psychiatric history and family background and *to present mitigating evidence to the jury at sentencing*, can constitute ineffective assistance." *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (emphasis added). Counsel is not deficient in failing to present certain testimony during the mitigation phase where he or she had a "credible reason." *Scott v. Mitchell*, 209 F.3d 854, 880-82 (6th Cir. 2000).

The Respondent argues that Attorney Scalzo made a strategic decision that evidence of dysfunctional family and social history would not help his case, and further that the Petitioner's criminal record would hurt it. [Tr. 123-25]. In response, Petitioner Dixon argues that if his attorneys had "tightly scripted" the witnesses to discuss only his bad childhood and make no mention of him being "a good kid," then the attorneys could have presented this evidence without also allowing evidence of Dixon's rape of his 11-year-old sister or conviction for gross sexual imposition. The Petitioner also argues that his counsel was deficient in failing to make a motion in limine to exclude the evidence of his conviction for Gross Sexual Imposition.[1]

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[1] At the state court level, the Petitioner failed to argue that his counsel's failure to make this motion in limine was ineffective. Nevertheless, as Ohio has not explicitly objected that the Petitioner failed to raise this argument in state court,

In this case, the Petitioner's attorneys had engaged a mitigation specialist who had investigated the possible mitigating evidence. But they failed to file a motion in limine to learn how broadly the trial court would allow cross-examination. Attorney Scalzo testified that in his experience, there would be little sympathy for the Petitioner based on social history. [Tr. 122-23]. He testified that evidence of a dysfunctional family was not typically persuasive to Ohio juries. [*Id.*]. The mitigation specialist apparently felt differently. [Ex. 6, Erickson Aff.]. Neither Attorney Scalzo nor Attorney Geutedner, however, contacted Erickson in preparation for the penalty phase hearing to discuss potential strategies. [Tr. 60].

In *Austin v. Bell*, the trial counsel did not present any mitigating evidence "because he did not think that it would do any good." 126 F.3d 843, 849 (6th Cir. 1997). The Sixth Circuit found that "given that several of Austin's relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy." *Id.* This case is quite different. In *Austin*, the trial counsel did not call mitigation witnesses without any apparent reason other than the generalized opinion that it would not help. In contrast, Dixon's trial counsel had much to fear if they elicited evidence regarding his background. Perhaps Dixon's trial counsel could

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and the Court finds that the Petitioner cannot demonstrate prejudice, the Court addresses it here. See 28 U.S.C. 2254(b)(2).

cabin the extremely negative aspects of Dixon's background. Perhaps not. Dixon's counsel should have filed a motion in liminae to learn whether evidence regarding Dixon's social history would open the door to evidence on his bad character. Although Attorney Scalzo did not have a lot of potential mitigation material to use, he gave up an ability to make a fully informed decision.

Attorney Scalzo described his thinking regarding the risk with opening Dixon's past history:

> "[T]hat [past anti-social behavior] was something that we discussed, right. What I wanted to see I didn't want to see Archie die, period. And I looked, because I'd known him, and I don't want to see anybody sitting on death row. Now, to answer your question, yes, all these things. It was probably one of the most frustrating cases I've ever had, because I wanted to desperately to find something, anything that I could feel comfortable presenting to the jury that they would listen to. And we worked it out to economics. That was it. Archie's past didn't help, because I knew it, I lived it with him. And I'd represented him through many of the [past criminal cases.]"

[Tr. 123-24].

While Dixon's counsel could fear any offer of evidence that might put Dixon's character at issue, this does not explain why counsel did not try to obtain a ruling to determine whether evidence on Dixon's childhood circumstances would open the door to character evidence. In *Mason v. Mitchell*, 320

F.3d 604 (6th Cir. 2003), the Sixth Circuit interpreted Ohio law and found that evidence of difficult childhood circumstances would not necessarily open the door to evidence of that defendant's prior bad acts and bad character: "we observe once again that this reasoning does not apply to mitigating evidence about Mason's background and life history, which trial counsel did not investigate and thus had no opportunity to present at sentencing. Testimony that simply put Mason's childhood into context without misrepresenting it would not have been subject to the prosecutor's rebuttal evidence, which mostly concerned Mason's character." *Id.* at 627. Moreover, the ABA Guidelines that establish the standard for prevailing professional norms specifically state that an attorney should pursue motions in limine and all appropriate means to limit the introduction of otherwise inadmissible aggravating evidence when considering whether to present specific mitigating evidence. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hoftra L. Rev. 1055-56 (2003); *see also* *Hamblin*, 354 F.3d at 486. The Court can think of no basis for counsel's failure to obtain such a ruling. Evidence of Dixon's difficult childhood circumstances could have been offered without necessarily opening the door to bad character evidence.

Dixon had a dysfunctional family background and had been assaulted at least twice by his drunken father. Counsel's failure to make a motion in limine made "a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527-28. The Court, however, need not decide

whether this was deficient as the Court finds no prejudice.

d. Failure to Present Mitigating Evidence – Prejudice

The Court does not find prejudice. Neither the evidence of Dixon's antisocial personality disorder nor the evidence of his poor family history undermines this Court's confidence in the outcome of the penalty phase. As reflected in Psychologist Layne's testimony: "Dixon—essentially had no psychological reasons to do what he did, and conversely, I found that his personality was basically a criminal personality, called an Antisocial Personality Disorder." [Tr. 67]. Had the defense presented evidence of Dixon's psychological profile or any evidence that he was a "good guy," his previous convictions, including the conviction for Gross Sexual Imposition of a four year old, would surely have been introduced into evidence. *See* *State v. Jalowicz*, 91 Ohio St.3d 220 (2000); *State v. Green*, 90 Ohio St.3d 352 (2000). As a result, the Court finds that the exclusion of this evidence and the evidence of his criminal history does not undermine its confidence in the outcome of the penalty phase.

The exclusion of Dixon's social history is also not sufficient to undermine this Court's confidence in the outcome of the penalty phase. There was evidence that Dixon's father often made excuses for Dixon and was over-indulgent. Moreover, his abuse of Dixon and his family only occurred while he was drinking and he had stopped drinking in the years before the date of the murder.

In this case, the jury found two aggravating circumstances—that Dixon was the principal offender and committed the murder during a robbery and during a kidnaping. They also found that Dixon had committed the murders with prior calculation and design (an alternative to his being the principal offender in either of the two death specifications). Evidence of a poor childhood likely would not have been sufficient to change a member of the jury's mind. As such, the Ohio court of appeals determination that any failure to present mitigation evidence was not prejudicial is a reasonable application of clearly established law.

d. Overall Effect of Attorney's Strategies and the Application of *Cronic*

The Petitioner argues the Ohio courts should have applied *United States v. Cronic*. 466 U.S. 648 (1984). In *Cronic*, the Court held that where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of rights under U.S. CONST. AMEND. VI that makes the adversary process itself presumptively unreliable." *Id.* at 659. In deciding whether *Cronic* applies, the fundamental question "is whether the trial 'process [has lost] its character as a confrontation between adversaries;' if so, then 'the constitutional guarantee is violated.'" *Rickman v. Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997) (quoting *Cronic*, 466 U.S. at 656-57). If a petitioner shows a violation of the right to counsel under the *Cronic* standard, there is no need to demonstrate prejudice. *Id.*

In *Bell v. Cone*, the United States Supreme Court described the difference between *Cronic* and *Strickland*:

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorneys' failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' *Cronic, supra*, at 659 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind.

535 U.S. 685, 696-97 (2002). *Cronic* governs where counsel's representation leads to "an actual breakdown of the adversarial process during the trial of this case." *Cronic*, 466 U.S. at 657-58.

The Sixth Circuit applies *Cronic* where the "collapse of the adversarial system is imminently clear." *Moss v. Hofbauer*, 286 F.3d 851, 861 (6th Cir. 2002). In Moss, the Sixth Circuit refused to apply *Cronic* where counsel was prepared for trial, had strategic reasons for not cross-examining the two key government witnesses, cross-examined several others, and remained present and attentive throughout the trial. *Id.* at 862. The Sixth Circuit has also refused to apply a *Cronic* analysis where trial counsel failed to present mitigation evidence but argued for mitigation based on facts adduced at

trial. *See* *Sherrod v. Morgan*, 61 Fed. Appx. 936 (6th Cir. 2003). Thus, for *Cronic* to apply, counsel's failure to test the prosecution's case must be complete.

This Court must decide whether Dixon's counsel representation led to a "collapse of the adversarial system" *Moss*, 286 F.3d at 861. In this case, counsel only cross-examined three witnesses, and for a very limited amount of time. His cross-examination only takes up eight pages of the trial testimony. He further failed to cross-examine the two key government witnesses, despite impeachment evidence for at least one of them. During the penalty phase, counsel limited his evidence to testimony regarding when the Petitioner would be released from prison if the death penalty was not imposed. Counsel also attempted to introduce evidence that the Petitioner had been falsely imprisoned for rape and recently exonerated of that charge.

The Petitioner must prove his counsel entirely failed to oppose the prosecution, not allege failure "at specific points." *See* *Cone*, 535 U.S. at 696. In this case, the Petitioner alleges several moments of deficient performance, some of which had some strategic justification. Further, counsel's performance, although poor, does not show a collapse in the adversarial system. Like *Moss*, counsel had some strategic reasons for declining to cross-examine some of the witnesses. *See* *Moss*, 286 F.3d at 861. As noted in *Wiggins*, there can be good strategic reasons for failing to present mitigating evidence. *Wiggins*, 539 U.S. at 534. The Court finds that clearly established law dictates that *Strickland* and not *Cronic* applies to this case. *Cone*, 535 U.S. at

697. As such, the Ohio Supreme Court did not err in its application of clearly established law.

Based on the above, the Court finds that the Petitioner has made some showing of a violation of a constitutional right. The Court therefore grants a certificate of appealability on Dixon's ineffective assistance of counsel claims. 28 U.S.C. §2253(c); Fed. R. App. P. 22(b).

**C. Third Ground for Relief**

In his third ground for relief, Dixon argues that the trial judge's exclusion of Dixon's prior false incarceration for rape violated the Eighth and Fourteenth Amendments because it was a relevant mitigating factor that the jury should have been able to weigh during the penalty phase of the trial.

*1. Legal Standard*

The Eighth and Fourteenth Amendments to the United States Constitution require that the sentencing jury may not be precluded from considering any relevant circumstance as a mitigating factor in a capital case. *See Mills v. Maryland*, 486 U.S. 367, 371 (1988). "The constitution requires the state to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990).

To be considered by the jury, a court may require that the mitigating evidence be relevant. "[T]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard–any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—applies." *Tennard v. Dretka, 542 U.S. 274, 284 (2004)* (internal quotations omitted). Thus, mitigating evidence includes any aspects of the defendant's character or record or any of the circumstances of the events that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

"Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Tennard v. Dretka*, 542 U.S. 274, 285 (2004) (internal quotations omitted).

As an exclusion of mitigating evidence potentially undermines reliability of the sentencing determination, the burden is on the state to prove that the error was harmless beyond a reasonable doubt. *See Satterwhite v. Texas, 486 U.S. 249, 258 (1988).*

2. Analysis

The Petitioner argues that the trial court's exclusion of his false incarceration for rape stopped relevant mitigating evidence. The Ohio Supreme Court agreed. *State v. Dixon*, 101 Ohio St. 3d 328, 340-41 (2004) ("The trial court should have permitted this evidence to be submitted for the jury's consideration as a mitigating factor pursuant to O.R.C. 2929.04(B) because it fits within the 'history, character, and background of the offender.'"). The Ohio Supreme Court, however, found that the error

was harmless. *Dixon*, 101 Ohio St. 3d at 340. Though the Petitioner raised the issue as an Eighth Amendment claim, the Ohio Supreme Court treated the claim as one of state law, and did not engage in Chapman harmless error analysis. *Id*.

Turning first to the scope of review, the Sixth Circuit has held that where the state court has not addressed or resolved claims based on federal law, the decision is not an "adjudication on the merits." Thus, a federal habeas court reviews such unaddressed claims de novo. See *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir.2003); *Maples v. Stegall*, 340 F.3d 433 (6th Cir. 2003). In this case, the appellate court dealt with the admissibility of the mitigating evidence, but it did not address the issue as a federal claim. Therefore, when evaluating whether or not the exclusion of this evidence amounted to harmless error, this Court engages in an independent harmless error inquiry, not a review of a state court's harmless error inquiry. *See McKenzie*, 326 F.3d at 727 (applying de novo review to a sufficiency of the evidence claim where the state appellate court addressed only the admissibility but not the sufficiency of the evidence); *Cf. Coe v. Bell*, *161 F.3d 320, 334 (6th Cir. 1998)* (holding that where the state court did not address the issue of harmless error, a federal court may conduct an independent harmless error analysis on habeas review).

Having reviewed the record under this expanded scope, the Court finds that the exclusion of Dixon's false imprisonment evidence was harmless error.

When conducting a harmless error analysis on collateral review, courts apply the *Kotteakos* test,

also referred to as the "substantial injurious effect or influence" standard, as opposed to the "reasonable doubt standard" that appellate courts apply on direct review. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946); *Coy v. California*, 519 U.S. 2, 5 (1996); *O'Neal v. McAnich*, 513 U.S. 432 (1995); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81 at n.7 (2004). This standard applies even where the district court is the first court reviewing for harmless error because of a federal constitutional claim. *Gilliam v. Mitchel*, 179 F.3d 990, 995 (6th Cir. 1999). Under this standard, the court should grant the petitioner's request for habeas relief only where the court has grave doubt regarding the harmlessness of the error. *O'Neal*, 513 U.S. at 432; *California v. Roy*, 519 U.S. 2, 5 (1996). "Grave doubt"occurs in those instances where "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 432.

The Ohio Supreme Court independently re-assessed the sentence in this case. The Ohio court noted the false imprisonment for rape has "little, if any, relevance to whether Dixon should be sentenced to death." *State v. Dixon*, 101 Ohio St. 3d 328, 347 (2004). This Court agrees. Dixon's false imprisonment supplies two arguments for mitigation. First, evidence that Dixon was wrongly imprisoned for eight months on rape charges that were later dismissed may suggest that residual doubt should be considered, especially in death cases. But, under Ohio law, residual doubt is not appropriately considered in mitigation. *See*, *State v. McGuire*, 80 Ohio St. 3d 390, 403, 686 N.E.2d 1112,

1123 (Ohio 1997) ("Residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence [under Ohio law] because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender[.]").

Alternatively, Dixon presumably wished to offer evidence on the false rape charge imprisonment to evoke some measure of empathy. However, this evidence of false imprisonment contributes little to an assessment of Dixon's character in whether to impose a death sentence. The only mitigating evidence entitled to weight was the Petitioner's youth.

Given the overwhelming aggravating evidence, and the lack of mitigating evidence, the exclusion of the false imprisonment does not undermine the Court's confidence in the outcome of the sentencing phase of the trial. *See O'Neal*, 513 U.S. at 432.

The Court finds, however, that the Petitioner has made some showing of a violation of a constitutional right and will grant a certificate of appealability on this issue. 28 U.S.C. § 2253(c); Fed. R. Crim. P. 66(b).

**D. Fourth Ground for Relief**

In his Fourth Ground for Relief, Dixon argues that his right to due process was violated when the trial court erred under state law when instructing the jury during the penalty portion of the trial. At trial, Dixon did not object to the instruction. After trial, Dixon never claimed that the instruction

violated his federal constitutional rights, instead he argued that the instruction violated state law.

In dealing with this issue, the Ohio Supreme Court found that the trial court had erred as a matter of state law. The Ohio Supreme Court, however, found "the trial court's erroneous instruction did not irrevocably taint the jury's deliberative process" and found that "[g]iven the dearth of mitigating evidence in this case, the jury's determination was not adversely affected by the erroneous instruction." *Dixon*, 101 Ohio St. 3d at 343. After conducting the independent reassessment of the sentence required under Ohio law, the Ohio Supreme Court additionally found the death penalty appropriate.

Before this Court, Ohio argues that this claim involves only state-law issues and does not does not implicate federal law or constitutional rights.

*1. Legal Standard*

Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). As applied in the habeas context, this doctrine stops federal courts from reviewing claims that a state court has declined to address because of a petitioner's noncompliance with a state procedural requirement. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). "In these cases, the state judgment rests on independent and adequate state procedural grounds." *Thompson*, 501 U.S. at 730.

In reviewing this claim, the Ohio Supreme Court raised it *sua sponte*, found the instruction an error under state law, but found the error harmless. *State v. Dixon*, 101 Ohio St. 3d at 342. The Ohio Supreme Court did not consider any constitutional argument in regard to this claim, as Dixon never raised such an argument.

*2. Analysis*

The Petitioner's fourth ground for relief alleges the trial court's instructions deprived him of his due process rights and his right to be free of cruel and unusual punishment. At trial, the Petitioner objected to the instruction as an error of state law, but did not raise this question at all on appeal to the Ohio Supreme Court. Instead, the Ohio Supreme Court raised the issue *sua sponte* and found the instruction erroneous on state law grounds. The Court determined that the trial court improperly referred to an aggravating factor that is not a statutory aggravating factor.

II. Merits

This habeas claim raises the issue whether the instruction was incorrect as a matter of state law. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

The Petitioner argues, however, the instruction denied him Due Process. States have wide latitude to structure sentencing procedures.

*See* Boyde v. California, 494 U.S. 370, 376 (1990). Once a defendant is found eligible for death based on a constitutionally sufficient narrowing circumstance, the sentencer's discretion is practically unlimited. *See* Zant v. Stephens, 462 U.S. 862, 878-79 (1983). Jury consideration of non-statutory aggravating circumstances does not violate the Constitution, even when it violates state law. *Smith v. Mitchell*, 348 F.3d 177, 210 (6th Cir. 2003) *citing* Barclay v. Florida, 463 U.S. 939 (1983).

The Ohio Supreme Court reviewed the instruction under state law and found it harmless and alternatively cured by their independent reassessment of the sentence. *State v. Dixon*, 101 Ohio St. 3d. 328, 342 (2004). Such reassessments do not violate the Constitution. *See* Clemons v. Mississippi, 494 U.S. 738, 748 (1990); *Wiles v. Bagley*, 2005 U.S. Dist. LEXIS 9456 (N.D. Ohio. 2005) (upholding an Ohio Supreme Court's reassessment of a death sentence).

Even if erroneous under state law, the trial court's instruction does not implicate habeas claims. *See* Smith v. Mitchell, 348 F.3d 177, 210 (6th Cir. 2003) ("[t]he Supreme Court has also held that consideration of a non-statutory aggravating circumstance, even if contrary to state law, does not violate the Constitution." citing Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418 (1983)). Additionally, as required under Ohio law, the Ohio Supreme Court conducted an independent consideration of whether the aggravating circumstances outweighed the mitigation circumstances and found the death penalty appropriate. *See* Clemons v. Mississippi, 494 U.S. 738, 741, 110 S.Ct. 1441 (1990) ("Federal

Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review.") Because the Fourth Ground for Relief involves state law matters and because the Ohio Supreme Court independently considered the aggravating and mitigating factors, the Fourth Ground fails.

The Court further finds that the Petitioner has failed to make a substantial showing of a violation of a constitutional right and denies a certificate of appealability on this issue. 28 U.S.C. §2253(c).

**E. Fifth Ground for Relief**

In his fifth ground for relief, Dixon asserts that the trial court's instructions violated the Fourteenth Amendment by instructing the jury it could assume guilt.

*1. Legal Standard*

The Respondent claims that Dixon has procedurally defaulted his fifth assignment of error. A federal habeas court may not hear issues that the petitioner could have raised in the state court but failed to do so due to procedural default. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). In deciding whether the petitioner procedurally defaulted a claim, the Court considers four factors: (1) whether there is a state procedural rule that is applicable to the petitioner's claim; (2) whether the petitioner failed to comply with that rule; (3) whether the procedural rule was actually enforced in the

petitioner's case; and (4) whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim. See *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The Court can excuse procedural default if the petitioner demonstrates good cause for the default and prejudice resulting therefrom, or where failure to consider the claim would result in a fundamental miscarriage of justice. *See Wainwright*, 433 U.S. at 87; *Combs v. Coyle*, 205 F.3d 269, 274 (6th Cir. 2000). The prejudice must have worked to the petitioner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).

A federal habeas court is generally precluded from hearing issues that could have been raised in state court, but were not, and, consequently, can no longer be brought before a state court due to procedural default or waiver. *Wainwright*, 433 U.S. at 90-91; *Gray v. Netherland*, 518 U.S. 152, 162 (1996). See also *Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994). The Sixth Circuit has stated:

> [If] a habeas petitioner fails to obtain consideration of a claim by a state court, either due to the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaults and may not be considered by the federal court on habeas review.

*Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000).

*2. Analysis*

Applying the *Maupin* test, this Court finds that Dixon procedurally defaulted his claim that the trial court had committed constitutional error when it instructed the jury it could assume Dixon's guilt. The instruction stated:

> Thus, assuming a finding of the defendant is guilty beyond a reasonable doubt of the aggravated murder with prior calculation and design of Christopher Hammer as charged in Count I of the indictment, and further assuming a finding as to Specification 1 that the aggravated murder of Christopher Hammer was committed during the course of a kidnaping, and further finding beyond a reasonable doubt that the defendant, Archie J. Dixon, was either a principal offender in that murder or the aggravated murder was committed with prior calculation and design, will mandate a finding of guilty as to Specification 1.

(Vol. 9, 1252-53).

Dixon failed to object to this instruction at trial and the Ohio Supreme Court held this assignment of error procedurally defaulted, and only entitled to plain error review. *Dixon*, 101 Ohio St. 3d at 335 ("Defense counsel did not object to the alleged instruction and, therefore, waived all but plain error."). This meets the first two prongs of the *Maupin* test.

This procedural rule is an "adequate and independent state ground." Ohio's contemporaneous objection rule serves Ohio's interest in finality and ensuring the trial court has the opportunity to correct its own errors. The contemporaneous objection rule is well-established ad consistently applied. *See* Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000) *citing* United States v. Frady, 456 U.S. 152, 165-66 (1982) ("Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.").

Finally, Dixon alleges that he has shown cause and prejudice, and therefore this claim does not meet the fourth part of the *Maupin* test. Dixon alleges that his counsel was ineffective in failing to object to the instruction and that this failure caused him prejudice. Ineffective assistance of counsel, if proved, satisfies the cause prong of the fourth part of the *Maupin* test. White v. Schotten, 201 F.3d 743, 753 (6th Cir. 2000).

This Court finds, however, that even if Dixon could show that trial counsel was ineffective in his failure to object to this instruction, Dixon has not shown prejudice. The Ohio Supreme Court found that the jury instructions, taken as a whole, did not improperly instruct the jury to presume guilt. This Court considers challenged jury instructions in the context of the instructions given as a whole and the

trial record. *See* *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). The Ohio appellate courts likewise considered this instruction in the context of all the instructions. *State v. Dixon*, 101 Ohio St. 3d at 340.

In this case, the instructions allocated the burden of proof and persuasion to the government. The instructions included the presumption of innocence, and while the court used the word "assuming" in the challenged portion of the instructions, the court told the jury "if you find the defendant guilty of aggravated murder...it is your duty to deliberate further...whether the state has proved beyond a reasonable doubt that the defendant is guilty of aggravated murder..." (Tr. Vol. 9, p. 1243-44).

Taken as a whole, the jury instructions did not prejudice the Defendant. For the above reasons, the Court finds Dixon's fifth claim for relief is not well-taken. Moreover, the Court finds that the Petitioner has failed to make a substantial showing of a violation of a constitutional right and the Court denies the Petitioner a certificate of appealability on this issue. 28 U.S.C. §2253(c).

**F. Sixth Claim for Relief**

With his Sixth Claim, the Petitioner argues that the Ohio death penalty law is unconstitutional because it requires Courts conducting proportionality review under O.R.C. §2929.05(A) to examine only those cases in which a sentence of death was imposed and ignore those cases in which a life sentence was imposed.

*1. Legal Standard*

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. U.S. CONST. AMEND. VIII. The Eighth Amendment's protection are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

Punishment that is excessive constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584 (1977). The Eighth Amendment does not require a state appellate court to compare a death sentence with the penalties imposed in similar cases. *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984).

*2. Analysis*

The Ohio Supreme Court limits its proportionality review under state law to other cases where the death was imposed. This limitation is not contrary to clearly established federal law. The Supreme Court has held such review is not required. *See Pulley*, 465 U.S. at 43-44. Further, the Sixth Circuit has repeatedly held that Ohio's proportionality review passes constitutional muster. *E.g. Buell v. Mitchell*, 274 F.3d 337, 367-69 (6th Cir. 2001).

The Petitioner further argues that Ohio R. Crim. P.11(c)(3) violates the Constitution because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest can benefit from a trial judge's discretion to dismiss the specifications "in the interest of justice." Procedures that allow defendants to plead guilty and avoid a death sentence can impermissibly burden a defendant's right to a jury. *See United States v.*

*Jackson*, 390 U.S. 570 (1968). Ohio's law, however, does not allow defendants to plead guilty and avoid a death sentence. *See State v. Buell*, 22 Ohio St. 3d 124 (1986). In this case, Dixon asked to plead guilty if the prosecution would not seek the death penalty. The prosecution refused. Thus, the Petitioner could not have avoided a death sentence by pleading guilty.

The Petitioner further asserts Ohio's death penalty scheme is arbitrary and capricious in violation of Due Process and Equal Protection. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-95 (1976). He argues the statute should require the state to prove the absence of any mitigating factors or that death is the appropriate penalty. The Supreme Court, however, has held that a state death penalty statute may require the defendant to prove that mitigating circumstances outweigh aggravating circumstances. *See Walton v. Arizona*, 497 U.S. 639 (1990) *interpreted by Kansas v. Marsh*, 126 S. Ct. 2516 (2006).

Finally, the Petitioner argues Ohio's death penalty scheme violates international law. Treaties and international customary law are binding on the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The Petitioner fails to cite any international law with which he alleges Ohio's death penalty is in conflict. The Sixth Circuit has found that Ohio's death penalty neither violates international treaties to which the United States is a party nor customary international law. *Buell*, 274 F.3d at 372. As such, the Court finds this argument without support.

For the above reasons, this Court finds that the Ohio Supreme Court's finding that Ohio's death penalty is constitutional is neither contrary to nor an unreasonable application of clearly established federal law, as determined by the Supreme Court.

The Court further finds that the Petitioner has failed to make a substantial showing of a violation of a constitutional right and the Court denies the Petitioner a certificate of appealability on this issue. 28 U.S.C. §2253(c).

## IV. Conclusion

For the aforementioned reasons, the Court **DENIES** Dixon's petition for a writ of habeas corpus. Further, the Court also certifies, pursuant to 29 U.S.C. §1915(a)(3) that an appeal of this decision could be taken in good faith. The Court hereby issues certificates of appealability on Grounds One, Two, and Three and denies a certificate of appealability on Grounds Four, Five, and Six.

IT IS SO ORDERED.

Dated: July 23, 2008

*s/ James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

# APPENDIX E

[Cite as *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585.]

THE STATE OF OHIO, APPELLEE,
*v.*
DIXON, APPELLANT.

[Cite as *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585.]

*Criminal law – Aggravated murder – Death penalty upheld, when.*

(No. 2001-0013 – Submitted October 21, 2003 – Decided April 14, 2004.)

APPEAL from the Court of Appeals for Lucas County, L-96-004.

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PFEIFER, J.

{¶1} Archie J. Dixon, defendant-appellant, and Christopher Hammer were friends and former housemates. On September 22, 1993, Dixon and a codefendant, Timothy Hoffner, beat Hammer, tied him to a bed, and stole the contents of his wallet and his automobile. Dixon and Hoffner then drove Hammer to a remote area, buried him alive in a shallow grave, and left him to die. Dixon was convicted of the aggravated murder, aggravated robbery, and kidnapping of Hammer, and was sentenced to death.

{¶2} Hammer began his friendship with Dixon and Hoffner in the summer of 1993. For a short

period of time in mid-August 1993, Dixon, Hoffner, and Hammer stayed at the Toledo home of Kirsten Wilkerson, Dixon's girlfriend.

{¶3} In early September 1993, Dixon, Hoffner, and Michael Elting borrowed Hammer's car, a 1987 Dodge Daytona, to go to the movies. According to Elting, Dixon and Hoffner discussed what they could do with Hammer's car and where they could store it.

{¶4} On the afternoon of September 21, 1993, Dixon told Wilkerson that he and Hoffner were going to "get Chris tonight." Wilkerson understood this to mean that Dixon and Hoffner were going to kill Hammer. Later that evening, Dixon, Hoffner, and Hammer met at a Toledo pool hall.

{¶5} In the early morning of September 22, Dixon, Hoffner, and Hammer arrived at Wilkerson's house. Once there, Dixon and Hoffner attacked Hammer and severely beat him. Hoffner tried to break Hammer's neck, and Dixon struck Hammer in the head with a wine bottle. Hammer, in substantial pain and bleeding, begged his attackers to stop. Dixon and Hoffner then tied Hammer to a bunk bed ladder, and Dixon went through Hammer's wallet, taking $11 in cash, Hammer's birth certificate, and his Social Security card. At one point, Dixon and Hoffner discussed how they could dispose of Hammer's body.

{¶6} Dixon and Hoffner left Wilkerson's house to dig a grave, while Hammer remained tied to the ladder. After Dixon and Hoffner returned, they, along with Wilkerson, drove Hammer to the grave site in Hammer's car. Wilkerson stayed at the car while Dixon and Hoffner walked Hammer into the

woods, where they smoked a cigarette and said a prayer. Then they gagged and blindfolded Hammer, tied his hands and feet behind his back, and pushed him into the grave, still alive. Dixon and Hoffner held Hammer down while they covered him with dirt. After Hammer was completely buried, Dixon and Hoffner walked back and forth across the grave, packing down the dirt.

{¶7} On September 25, 1993, as part of a plan to sell Hammer's car, Dixon obtained a state of Ohio identification ("ID") card with his photograph but in Hammer's name. On September 30, Dixon obtained a duplicate certificate of title for Hammer's Dodge Daytona. Dixon then sold Hammer's car to a Toledo car dealer for $2,800.

{¶8} On November 1, 1993, an Ottawa Hills police officer stopped Dixon for vehicle equipment violations while he was driving Hoffner's Chrysler Cordoba. When the officer discovered that Dixon did not have driving privileges, the officer impounded the car. During an inventory of Dixon's car, police found the ID card with Dixon's picture but Hammer's name, address, birth date, and Social Security number.

{¶9} By November 8, 1993, police officers investigating Hammer's disappearance had located his Dodge Daytona at a used car lot in Toledo, had confirmed its unauthorized sale on September 30, and had identified Dixon as the prime suspect in the vehicle transaction. On November 9, Dixon was arrested and charged with forgery. Police, who did not advise Dixon of his *Miranda* rights, questioned him regarding the sale of Hammer's car. However, the primary interest of the police was not the sale of

the car but Hammer's disappearance. During this interview, Dixon confessed to the auto title forgery but denied all knowledge of Hammer's disappearance.

{¶10} Early on the afternoon of November 9, Hoffner led police to the location of Hammer's body. Dr. Cynthia Beisser, Deputy Coroner of Lucas County, performed the autopsy and concluded that Hammer had died of asphyxia. Dr. Beisser opined that Hammer had died within eight minutes of being buried and remained conscious during the first two to three minutes.

{¶11} After Hammer's body was exhumed, police interviewed Dixon again. Police twice advised Dixon of his *Miranda* rights. He signed a waiver-of-rights form and provided a tape-recorded account of the kidnapping, robbery, and murder of Hammer that reflects the facts already described.

{¶12} The defense presented no evidence during the trial phase.

{¶13} The grand jury indicted Dixon, Hoffner, and Wilkerson for the aggravated murder, kidnapping, and aggravated robbery of Hammer. Dixon was indicted on three counts of aggravated murder. Count nine of the indictment charged Dixon with aggravated murder involving prior calculation and design pursuant to R.C. 2903.01(A). Count ten charged Dixon with aggravated murder while committing kidnapping, and count 11 charged Dixon with aggravated murder while committing aggravated robbery, both pursuant to R.C. 2903.01(B). Dixon was also indicted for kidnapping

in count twelve, aggravated robbery in count 13, and three counts of forgery in counts 14, 15, and 16.

{¶14} Each count of aggravated murder contained two identical R.C. 2929.04(A)(7) death-penalty specifications. The first specification charged aggravated murder during a kidnapping, and the second charged aggravated murder during an aggravated robbery.

{¶15} The jury convicted Dixon as charged and recommended the death penalty. The trial court sentenced Dixon to death for the murder, ten to 25 years in prison for each kidnapping and aggravated robbery conviction, and to 18 months in prison for each forgery offense. All prison terms were consecutive. The court of appeals affirmed Dixon's convictions and sentence of death. The cause is now before this court upon an appeal as of right.

***Miranda* issue**

{¶16} In proposition of law No. 1, Dixon challenges the court of appeals' decision to reverse the trial court's suppression of his murder confession. The trial court had suppressed Dixon's statements admitting to the auto title forgery and to Hammer's murder. The state filed an appeal, pursuant to R.C. 2945.67 and Crim.R. 12(J), challenging only the suppression of Dixon's murder confession. The court of appeals reversed the trial court's decision, and the trial proceeded with the confession in evidence. *State v. Dixon* (1995), 101 Ohio App.3d 552, 656 N.E.2d 1.

{¶17} Dixon contends that his confession was inadmissible because the police decision not to administer *Miranda* warnings undermined his

ability to exercise his will to refuse to speak, depriving him of his Fifth Amendment right against self-incrimination.

{¶18} During the investigation into Hammer's disappearance, the police questioned Dixon on four separate occasions, three of which are relevant here. On November 4, 1993, Dixon went to the Sylvania Township Police Department to obtain the release of the impounded Chrysler. Coincidentally, Toledo Detective Ron Scanlon was then meeting with Sylvania Detective Vern Snow regarding Hammer's disappearance. Scanlon had information that Dixon and Hammer had once lived together, and he and Snow attempted to question Dixon ("session I"). Although Dixon was not under arrest or in custody, Scanlon issued *Miranda* warnings. When Dixon said that he wanted to speak with his attorney, the detectives stopped questioning him, and Dixon left the station.

{¶19} On November 9, 1993, Dixon was arrested for forgery, and Snow and Detective Phil Kulakoski questioned Dixon at the Toledo Police Department ("session II"). Kulakoski, after consulting with Snow, decided not to advise Dixon of his *Miranda* rights because the detectives believed that Dixon would invoke his right to counsel if he were issued *Miranda* warnings.

{¶20} The detectives questioned Dixon from approximately 11:30 a.m. to 3:30 p.m. Because of several breaks during questioning, the entire interview lasted only about 45 minutes. The police were focused primarily on Hammer's disappearance, but Dixon made incriminating statements regarding only the forgery charge. He denied all knowledge of

Hammer's disappearance during the session II interview. In response to Kulakoski's assertion that something had happened to Hammer, Dixon stated:

{¶21} "[T]hat is understandable, but everything I know I've already told you. I have been more than welcome to tell you. I mean usually like I told you, you can ask that gentleman [Detective Snow] right here * * * I didn't even want to speak with you guys unless I had an attorney present, because * * * I have no faith in the system anymore, but yet like I say I just now told you, I told you everything I know[, I] admitted to forgery * * *."

{¶22} At the end of the interview, Dixon was returned to the county jail. Shortly thereafter, Kulakoski learned that Hammer's body had been discovered. As a result, Kulakoski and Detective Robert Leiter decided to question Dixon again. At approximately 7:30 p.m., Kulakoski and Leiter transported Dixon to the station. Prior to any questioning from police, Dixon volunteered that he had heard that police had found a body and asked whether Hoffner was in custody. After police told Dixon that Hoffner was not in custody, Dixon said, "I talked to my attorney, and I want to tell you what happened." Police then twice advised Dixon of his *Miranda* rights, and the second warning was tape-recorded. Dixon waived his *Miranda* rights, signed a waiver-of-rights form, and gave a statement implicating himself and Hoffner in Hammer's death ("session III").

{¶23} The parties do not dispute that the statements Dixon made in session II were properly suppressed. At issue here are Dixon's statements in session III, after police had found Hammer's body,

and after Dixon was twice fully advised of his *Miranda* rights.

{¶24} The United States Supreme Court's decision in *Oregon v. Elstad* (1985), 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222, is the leading case on this issue. *Elstad* held that if a suspect's statement obtained in violation of *Miranda* is nevertheless voluntary, the Fifth Amendment does not require the suppression of a subsequent confession made after a suspect has been fully advised of and has properly waived *Miranda* rights. Id. at 318, 105 S.Ct. 1285, 84 L.Ed.2d 222. The *Elstad* court rejected the contention that the suspect's confession must be excluded as "fruit of the poisonous tree" because it had been tainted by the earlier failure of the police to provide *Miranda* warnings. Id. at 305-307, 105 S.Ct. 1285, 84 L.Ed.2d 222, quoting *Wong Sun v. United States* (1963), 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441. The court reasoned that there was no need to presume a coercive effect on a later confession when the suspect's first statement, though technically obtained in violation of *Miranda*, had been voluntary. Id. at 318, 105 S.Ct. 1285, 84 L.Ed.2d 222.

{¶25} *Elstad* requires courts to make a threshold inquiry into the effect of the violation on the voluntariness of the suspect's unwarned statement. See id. at 312 and at 317-318, 105 S.Ct. 1285, 84 L.Ed.2d 222. "Whether a statement was made voluntarily and whether an accused voluntarily, knowingly, and intelligently waived his right to counsel and right against self-incrimination are distinct issues. However, both are measured by the 'totality of circumstances' standard" (e.g., the

age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement). *State v. Eley* (1996), 77 Ohio St.3d 174, 178, 672 N.E.2d 640. See, also, *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844; *State v. Moore* (1998), 81 Ohio St.3d 22, 31, 689 N.E.2d 1. See, also, *State v. Edwards* (1976), 49 Ohio St.2d 31, 3 O.O.3d 18, 358 N.E.2d 1051, paragraph two of the syllabus. While the state carries the burden of proving voluntariness by a preponderance of the evidence, "evidence of police coercion or overreaching is necessary for a finding of involuntariness * * *." *State v. Hill* (1992), 64 Ohio St.3d 313, 318, 595 N.E.2d 884, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 164, 107 S.Ct. 515, 93 L.Ed.2d 473.

{¶26} There is no evidence of coercive tactics that would have rendered Dixon's unwarned statements in session II involuntary. The detectives did not threaten Dixon in any way, nor was there physical or verbal abuse. Dixon was given several breaks during the interview, was given something to drink, was offered food, and was permitted to go to the bathroom. See *State v. Cooey* (1989), 46 Ohio St.3d 20, 28, 544 N.E.2d 895; *Clark*, 38 Ohio St.3d at 261, 527 N.E.2d 844. Moreover, there is no evidence that the detectives' strategy not to *Mirandize* Dixon had the effect of undermining Dixon's will to refuse to speak with them. Dixon has failed to explain how the detectives' subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent.

{¶27} Police also did not make any promises to Dixon that affected the voluntariness or admissibility of his confession. Admittedly, near the end of the interview in session II, Kulakoski told Dixon that if he had been involved in Hammer's disappearance, "now is the time to say so because if Tim [Hoffner] cuts a deal * * * it's kinda like a bus leaving. The first one that gets on is the only one that gets on."

{¶28} The trial court placed significance on Kulakoski's "bus analogy," finding that his statement could be perceived as a promise of possible benefits if Dixon revealed information regarding Hammer's disappearance. However, a promise made by a police officer is merely one factor to be considered along with other circumstances in determining whether a defendant's statement was voluntary. *Edwards*, 49 Ohio St.2d at 40-41, 3 O.O.3d 18, 358 N.E.2d 1051. It does not matter that the accused confessed in response to the promise so long as the promise did not overwhelm his will. See, e.g., *State v. Burke* (1995), 73 Ohio St.3d 399, 406, 653 N.E.2d 242, citing *State v. Melchior* (1978), 56 Ohio St.2d 15, 25, 10 O.O.3d 8, 381 N.E.2d 195.

{¶29} In addition, Kulakoski's bus analogy is more akin to an admonition to tell the truth than a promise of possible benefits. Police use of such tactics is not improper. See *Cooey*, 46 Ohio St.3d at 28-29, 544 N.E.2d 895; and *Edwards*, 49 Ohio St.2d at 39-41, 3 O.O.3d 18, 358 N.E.2d 1051. See, also, *Illinois v. Perkins* (1990), 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 ("Ploys to mislead a suspect or lull him into a false sense of security that

do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns").

{¶30} Any effect that the bus analogy had on Dixon's murder confession is purely speculative. Dixon did not testify at the suppression hearing, and Dixon denied all knowledge of Hammer's disappearance during session II, when the bus analogy was made. Moreover, any argument that Dixon's will was undermined at any point during session II on November 9 is suspect in light of Dixon's prior invocation of his Fifth Amendment rights. Dixon also indicated his awareness of his rights during session II. Further, at the outset of session III, Dixon stated that he had spoken with his attorney and indicated that he had been told to cooperate with police. Finally, Dixon's own words belie the assertion that any statements made during session II were involuntary: "[E]verything I know I've already told you [Detectives Kulakoski and Snow]. I have been more than welcome to tell you."

{¶31} Additionally, because Dixon denied all knowledge of Hammer's disappearance during session II, no nexus was established between Dixon's unwarned statements in session II and his confession in session III. Thus, Dixon's confession in session III was not the "fruit" of the session II interview. Dixon's statements from session II, although unwarned, were voluntary, and they did not affect the voluntariness of his session III confession or impair his ability to give a valid waiver.

{¶32} Once a court determines that a suspect's unwarned statement was voluntary, the focus of the inquiry shifts to whether the suspect's subsequent statement was knowingly and voluntarily made.

*Elstad*, 470 U.S. at 309 and at 317-318, 105 S.Ct. 1285, 84 L.Ed.2d 222. Here, Dixon's warned confession in session III was voluntary. Police twice read *Miranda* warnings to Dixon, and both times he waived his rights. Dixon also signed a waiver-of-rights form. Dixon's waiver of rights and his entire confession were recorded. Dixon acknowledged that he understood his rights and that he was making his statement of his own free will. He assented that he was not under the influence of drugs or alcohol and that no deals or promises had been made in exchange for his confession. The entire interview lasted approximately half an hour, there was no evidence of mistreatment, and Dixon remained calm and collected throughout.

{¶33} In addition, four hours had lapsed between session II and session III. At the outset of session III, Dixon initiated the conversation when the detectives came to question him by asking about the discovery of Hammer's body and Hoffner's whereabouts. He also indicated his willingness to talk about Hammer's disappearance. Dixon was 20 years old at the time of his confession and was familiar with the criminal justice system and his rights thereunder. Therefore, based on the totality of the circumstances, we conclude that Dixon knowingly and voluntarily waived his right to remain silent and to consult with counsel on the occasion of his session III interview on November 9.

{¶34} Admittedly, session II, in contrast to the circumstances in *Elstad*, involves an intentional *Miranda* violation. Nevertheless, as in *Elstad*, the breach of the *Miranda* procedures here involved no actual compulsion. Thus, suppression of Dixon's

confession, made after he had executed an intelligent and voluntary waiver of rights, will not advance the general goal of deterring improper police conduct or the Fifth Amendment goal of assuring trustworthy evidence. See *Elstad*, 470 U.S. at 318, 105 S.Ct. 1285, 84 L.Ed.2d 222 ("[T]he dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied" in this case by "barring use of the unwarned statement" and "[n]o further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver").

{¶35} For the foregoing reasons, we reject Dixon's first proposition of law.

***Trial-Phase Issues***

{¶36} In proposition of law No. 5, Dixon contends that the trial court's failure to inquire on the record whether he knowingly and intelligently waived his right to testify violated his right to due process. We rejected this same argument in *State v. Bey* (1999), 85 Ohio St.3d 487, 499-500, 709 N.E.2d 484. Proposition of law No. 5 is summarily rejected.

{¶37} Dixon contends in proposition of law No. 6 that the trial court erred because it instructed the jury that it could assume Dixon's guilt and that the assumption would require the jury to return a guilty verdict. Defense counsel did not object to the alleged instruction and, therefore, waived all but plain error. Crim.R. 30(A); Crim.R. 52(B); *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus. There was no plain error.

{¶38} The trial court did not instruct the jury that it could assume Dixon's guilt. During one portion of its trial-phase instructions, the trial court charged the jury:

{¶39} "Thus, assuming a finding of the defendant is guilty beyond a reasonable doubt of the aggravated murder with prior calculation and design of Christopher Hammer as charged in Count [9] of the indictment, and further assuming a finding as to Specification 1 that the aggravated murder of Christopher Hammer was committed during the course of a kidnapping, and further finding beyond a reasonable doubt that the defendant, Archie J. Dixon, was either a principal offender in that murder or that the aggravated murder was committed with prior calculation and design, will mandate a finding of guilty as to Specification 1."

{¶40} Despite an unfortunate choice of words, it is clear that the trial court did not instruct the jury that it must assume Dixon's guilt. Rather, the trial court instructed the jury that *if* it found beyond a reasonable doubt the facts alleged in the charge and specification one in count nine, the jury was required to return a guilty verdict as to that charge and specification.

{¶41} Moreover, a single jury instruction "may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price* (1979), 60 Ohio St.2d 136, 14 O.O.3d 379, 398 N.E.2d 772, paragraph four of the syllabus. Our review of the trial-phase instructions in their entirety indicates that the jury was properly charged on the presumption of innocence, reasonable doubt, and the burden of proof.

{¶42} We overrule proposition of law No. 6.

***Ineffective Assistance of Counsel***

{¶43} In proposition of law No. 2, Dixon alleges various instances of ineffective assistance of counsel. Reversal of a conviction or sentence based upon ineffective assistance of counsel requires satisfying the two-pronged test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *Strickland* requires that the defendant first show that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the defense so as to deprive defendant of a fair trial. Id. at 693, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶44} Dixon contends that trial counsel were deficient during voir dire when they failed to meaningfully examine jurors' views on capital punishment. This claim lacks merit.

{¶45} "The conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Evans* (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042. Moreover, not questioning certain members of the venire or asking too few questions of prospective jurors falls within the wide range of reasonable professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143-144, 538 N.E.2d 373, citing *Strickland*, supra.

{¶46} During voir dire, the trial court and counsel questioned prospective jurors individually about their views on capital punishment. The trial court asked prospective jurors whether they were "morally, religiously, philosophically, or otherwise opposed to the death penalty"; whether, if

appropriate, they could vote for the death penalty; and, whether they would fairly consider the two other sentencing options of life imprisonment with parole eligibility after 20 or 30 years. The trial court also asked prospective jurors whether they would automatically vote to impose the death penalty regardless of the facts of the case.

{¶47} Both state and defense counsel were then permitted to question prospective jurors as to their views on capital punishment. In most instances, defense counsel merely asked whether prospective jurors would follow the law and the judge's instructions and whether they would consider other penalty options besides death.

{¶48} Defense counsel's performance in this regard was not deficient. See *Bradley*, 42 Ohio St.3d at 143-144, 538 N.E.2d 373. See, also, *State v. Watson* (1991), 61 Ohio St.3d 1, 13, 572 N.E.2d 97 (counsel need not repeat questions about topics already covered by group voir dire, the trial judge, or the prosecutor). The record demonstrates appropriate questioning. Whenever a prospective juror indicated a possible pro-death-penalty bias, the court and defense counsel inquired further into his or her beliefs.

{¶49} Dixon also contends that defense counsel failed to ensure that the prospective jurors could fairly consider life. See *Morgan v. Illinois* (1992), 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492. To show prejudice under the *Strickland* standard, Dixon would have to show that the jurors who actually decided the case were not impartial. See *State v. Broom* (1988), 40 Ohio St.3d 277, 287-288, 533 N.E.2d 682.

{¶50} We find that the record does not support Dixon's claim. Defense counsel questioned nearly every prospective juror about whether he or she would fairly consider a life sentence if warranted. The only prospective jurors that defense counsel did not question on this issue were those who expressed reservations or outright opposition to the death penalty. Thus, Dixon has not shown counsel's performance to be deficient.

{¶51} Dixon next contends that defense counsel admitted guilt at the outset of the trial "with a seventeen sentence opening statement." Defense counsel did not concede Dixon's guilt. In fact, defense counsel informed the jury that Dixon was innocent until proven guilty and that the burden was on the prosecution to prove guilt. Moreover, the defense reminded the jury of the court's and counsel's previous statements regarding reasonable doubt made during both individual voir dire and prior to the exercise of peremptory challenges.

{¶52} Courts must be highly deferential to counsel's performance and will not second-guess trial strategy decisions. *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 166, 749 N.E.2d 226. While admittedly brief, defense counsel's opening statement did not fall below a reasonable standard of professional assistance. See *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶53} Dixon also argues that defense counsel were ineffective by cross-examining only three of the 15 state witnesses and failing to impeach or cast doubt upon their testimony. The defense challenged the state's portrayal of Hammer as a totally innocent young man of exemplary character. In an attempt to

diffuse juror sympathy, defense counsel cross-examined Jennifer Wodarski-Felt, the victim's former girlfriend, and Barbara Hammer, the victim's mother, regarding Christopher Hammer's alleged involvement with drugs and misuse of a credit card. The defense also questioned Detective Kulakoski regarding the discovery of Hammer's body near the Michigan border, a state without the death penalty, in an apparent attempt to suggest the arbitrariness of the death penalty to the jury. In addition, defense counsel attempted to introduce testimony regarding Hammer's alleged conviction of felony auto theft.

{¶54} Counsel's tactical decisions reflected reasonable representation. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not constitute lack of effective assistance of counsel. See *Bradley*, 42 Ohio St.3d at 142-144, 538 N.E.2d 373.

{¶55} The testimony of other state witnesses consisted primarily of eyewitness accounts and conversations regarding Dixon's involvement in Hammer's murder, stealing and selling the victim's car, obtaining a fake ID and duplicate automobile title, and his confession. Experienced counsel would realize that any attempt to cross-examine these witnesses would have merely reemphasized their damaging testimony. Moreover, Dixon has not shown how defense counsel could have cross-examined the state's witnesses so as to alter the

outcome of the trial. Defense counsel were not ineffective for avoiding such cross-examination.

{¶56} Dixon further contends that his counsel failed to impeach the state's most critical witness, Kirsten Wilkerson. Wilkerson, Dixon's former girlfriend, gave a firsthand account of Hammer's murder. Dixon claims that Wilkerson's version of the facts was suspect because she had made three different statements to the police. However, nothing in the record shows that Wilkerson provided the police with inconsistent statements, nor does Dixon indicate what discrepancies exist. Nevertheless, even if defense counsel were deficient in failing to impeach Wilkerson, we find no prejudicial error in view of the overwhelming evidence of guilt.

{¶57} Finally, Dixon argues that defense counsel's trial-phase closing argument was a failure. During closing argument, defense counsel indicated that their primary strategy was to prevent Dixon's death. Defense counsel reminded the jury of the state's burden to prove every element of the offenses charged beyond a reasonable doubt and asked jurors to follow the judge's instructions and apply the law conscientiously. Moreover, defense counsel cautioned the jury to carefully examine the testimony of Dixon's alleged accomplice, Wilkerson. Defense counsel's performance during closing argument represented a permissible tactical decision. See *State v. Ballew* (1996), 76 Ohio St.3d 244, 256-257, 667 N.E.2d 369.

{¶58} Dixon has provided no basis for concluding that defense counsel's performance fell below an objective standard of reasonable representation or that any different tactical choices

would have made any difference in the jury's verdict in view of the strong evidence of guilt, including his confession to the murder. *Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373. Therefore, we reject Dixon's second proposition of law.

{¶59} In proposition of law No. 4, Dixon claims that he was denied the effective assistance of counsel during his mitigation hearing when his trial counsel failed to investigate or present other available mitigation evidence.

{¶60} In *Wiggins v. Smith* (2003), 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471, the United States Supreme Court held that the failure to conduct a reasonable investigation into defendant's history and background and present mitigating evidence constituted ineffective assistance of counsel. See, also, *Williams v. Taylor* (2000), 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389. The Supreme Court found in *Wiggins* that defense counsel's decision to limit its investigation into potential mitigating evidence in pursuing an alternative strategy was unreasonable under prevailing professional norms. *Wiggins*, 539 U.S. at ___, 123 S.Ct. at 2536-2537, 156 L.Ed.2d 471.

{¶61} In order to determine whether trial counsel's performance during mitigation prejudiced Dixon's defense within the meaning of *Strickland*, we would have to reweigh the evidence in aggravation against the totality of available mitigating evidence. *Wiggins*, 539 U.S. ___, 123 S.Ct. at 2542-2543, 156 L.Ed.2d 471, citing *Williams*, 529 U.S. at 397-398, 120 S.Ct. 1495, 146 L.Ed.2d 389.

{¶62} Here, there is no way to determine, based on the record before us, whether sufficient mitigating evidence existed that would have called for a sentence less than death. Because we cannot look outside the record to assess prejudice, this ineffective-assistance claim must fail. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus. See, also, *State v. Madrigal* (2000), 87 Ohio St.3d 378, 390-391, 721 N.E.2d 52. Therefore, we also reject proposition of law No. 4.

{¶63} Dixon argues in proposition of law No. 10 that trial counsel's failure to preserve errors identified in his brief deprived him of the effective assistance of counsel. Dixon further contends that the cumulative effect of counsel's errors deprived him of a fair trial.

{¶64} We conclude that Dixon has failed to satisfy the test outlined in *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Dixon has pointed to only two instances where defense counsel failed to object to alleged errors committed by the trial court. See Dixon's propositions of law No. 5 and No. 6. We have examined both of these claims and have found them meritless. Dixon has not identified any other instance where he was prejudiced by counsel's failure to preserve issues for appeal.

{¶65} Furthermore, counsel's errors are judged under the *Strickland* standard. We reject Dixon's contention that the number of errors committed by counsel deprived him of his right to a fair trial. See, generally, *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1256, paragraph two of

the syllabus. Thus, we reject Dixon's proposition of law No. 10.

***Sentencing-Phase Issues***

{¶66} In proposition of law No. 3, Dixon contends that the trial court erred when it excluded certain evidence during the mitigation phase. Before the start of mitigation, Dixon's counsel informed the court that they intended to introduce evidence of two other capital murders in Lucas County where the prosecutor eliminated the death specifications in exchange for guilty pleas to aggravated murder. Trial counsel additionally wanted to introduce evidence that Dixon accepted complete responsibility for the crimes by offering to plead guilty to the charges in exchange for dismissal of the death-penalty specifications. Defense counsel also proffered evidence regarding Dixon's prior incarceration on a rape charge based on a false allegation, which was subsequently dismissed.

{¶67} The applicable statute, R.C. 2929.04(C), gives a defendant wide latitude to introduce any evidence the defendant considers mitigating. See R.C. 2929.04(B)(7); *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus. Nonetheless, the trial court can exclude evidence that is not relevant to the jury's sentencing decision. The question of relevancy is governed by the Rules of Evidence, and those rules apply to the sentencing phase of a capital trial. *State v. Williams* (1995), 73 Ohio St.3d 153, 159, 652 N.E.2d 721. See, also, *State v. Jenkins* (1984), 15 Ohio St.3d 164, 189-190, 15 OBR 311, 473 N.E.2d 264 (testimony of a former death-row inmate, a social scientist, and a specialist in the rehabilitation of

paraplegics excluded as irrelevant); and *State v. Roe* (1989), 41 Ohio St.3d 18, 25, 535 N.E.2d 1351 (testimony of social worker deemed irrelevant). The admission or exclusion of relevant evidence lies within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus.

{¶68} Here, the trial judge did not err in excluding evidence related to other capitally indicted offenses in Lucas County. The admission of such evidence would have invited the jury to engage in a speculative analysis of sentencing disparity that is not authorized by law. The proportionality review mandated by R.C. 2929.05 is reserved for appellate courts and "is satisfied by 'a review of those cases already decided by the reviewing court in which the death penalty has been imposed.'" *State v. Sneed* (1992), 63 Ohio St.3d 3, 17, 584 N.E.2d 1160, quoting *Steffen*, 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus. Further, we rejected a similar argument in *Roe*, 41 Ohio St.3d at 25, 535 N.E.2d 1351, by upholding the trial court's exclusion of testimony regarding capitally indicted cases in Franklin County where defendants had received life sentences.

{¶69} The trial court also ruled correctly by not allowing Dixon to introduce his offer to plead guilty in exchange for dismissal of the death specifications. In *State v. Webb* (1994), 70 Ohio St.3d 325, 336, 638 N.E.2d 1023, we concluded that "[a] prosecutor's offer to negotiate a guilty plea in a capital case is not a mitigating factor under either R.C. 2929.04(B)(7) or the Eighth Amendment * * * [and] such an offer does not affect the appropriateness of the death penalty."

See, also, *Sneed*, 63 Ohio St.3d at 16-17, 584 N.E.2d 1160. We also conclude that a defendant's offer to plead guilty, never accepted by the prosecutor, is not relevant to the issue of whether the defendant should be sentenced to death.

{¶70} Finally, the trial court's exclusion of proposed evidence regarding Dixon's prior incarceration on rape charges was harmless. Defense counsel had intended to introduce evidence that, prior to the murder, Dixon was exonerated after spending several months in jail on rape charges. The trial court should have permitted this evidence to be submitted for the jury's consideration as a mitigating factor pursuant to R.C. 2929.04(B) because it fits within the "history, character, and background of the offender." See *State v. Stumpf* (1987), 32 Ohio St.3d 95, 100-101, 512 N.E.2d 598. See, also, *State v. White* (1999), 85 Ohio St.3d 433, 448, 709 N.E.2d 140. Nevertheless, our independent reassessment of the sentence will minimize any prejudicial impact. *State v. Lundgren* (1995), 73 Ohio St.3d 474, 486, 653 N.E.2d 304, citing *State v. Landrum* (1990), 53 Ohio St.3d 107, 115, 559 N.E.2d 710.

{¶71} Therefore, we overrule proposition of law No. 3.

{¶72} Dixon contends in proposition of law No. 7 that the trial court erred in instructing jurors to weigh his history, character, and background after it precluded him from introducing such evidence. Dixon argues in proposition of law No. 8 that the trial court erred in instructing the jury to weigh the nature and circumstances of the offense against the aggravating factors when he never presented the

nature and circumstances of the offense as mitigating factors.

{¶73} At trial, defense counsel objected to including references to the nature and circumstances of the offense and Dixon's history, character, and background. Despite overruling the objection, the trial court's oral charge to the jury inadvertently failed to instruct the jury to weigh those factors in mitigation. The trial court subsequently submitted amended written instructions to the jury correcting this omission. Defense counsel maintained its earlier objection but did not object to submission of those omitted instructions to the jury in writing.

{¶74} The penalty-phase instructions were not erroneous. R.C. 2929.04(B) requires the jury to consider whether anything mitigating exists in the nature and circumstances of the offense and the history, character, and background of the offender. See *Steffen*, 31 Ohio St.3d at 116-117, 31 OBR 273, 509 N.E.2d 383; and *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212. Moreover, the trial court made no improper comment regarding any mitigating factors not raised by Dixon. Thus, the trial court committed no error.

{¶75} Therefore, we deny Dixon's seventh and eighth propositions of law.

***Sentencing-Phase Errors***

{¶76} In an issue not raised on appeal, we find that the trial court erred in its penalty-phase instructions regarding the aggravating circumstances that Dixon was found guilty of committing. Dixon was found guilty of two death specifications in connection with each of the three

aggravated murder counts charged. The first specification alleged that Dixon committed aggravated murder during the course of a kidnapping and either was the principal offender or, if not, acted with prior calculation and design. See R.C. 2929.04(A)(7). The second specification used similar form language and charged Dixon with aggravated murder during an aggravated robbery. Id.

{¶77} The trial court, however, instructed the jury that the aggravating circumstances are as follows:

{¶78} "What are aggravating circumstances? In this case, the aggravating circumstances are precisely set out in the specifications contained in your guilty verdict forms as to the [ninth, tenth, and eleventh] counts of the indictment. They are as follows:

{¶79} "That the defendant, Archie J. Dixon, caused the death of Christopher Hammer *with prior calculation and design and was the principal offender* in the aggravated murder.

{¶80} "Two: That the defendant, Archie J. Dixon, caused the death of Christopher Hammer while the defendant was committing kidnapping and that the defendant was the principal offender in the aggravated murder.

{¶81} "Three: That the defendant, Archie J. Dixon, caused the death of Christopher A. Hammer while the defendant was committing aggravated robbery, and the defendant was the principal offender in the aggravated murder." (Emphasis added.)

{¶82} The first purported aggravating circumstance referred to in the trial court's instructions is not one of the enumerated statutory aggravating circumstances set forth in R.C. 2929.04(A). At best, it is an incomplete statement of a portion of R.C. 2929.04(A)(7). "Prior calculation and design," however, should never be used in the conjunctive with "principal offender" because "prior calculation and design" is relevant in the specifications only if the defendant *is not* a principal offender. See *State v. Penix* (1987), 32 Ohio St.3d 369, 371, 513 N.E.2d 744. See, also, e.g., *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831, fn. 2.

{¶83} The aggravating circumstances that may be considered in imposing the death penalty are those specifically enumerated in R.C. 2929.04(A) and set forth in the indictment. R.C. 2941.14. Thus, the trial court clearly erred in instructing the jury as to the existence of a nonstatutory aggravating circumstance in this case. See *Penix*, 32 Ohio St.3d at 370-372, 513 N.E.2d 744. See, also, *State v. Johnson* (1986), 24 Ohio St.3d 87, 92-94, 24 OBR 282, 494 N.E.2d 1061. The court of appeals similarly erred in its independent sentencing determination when it seemed to weigh three aggravating circumstances against the mitigating factors. Defense counsel had objected to the erroneous instruction and, thus, preserved this issue for appellate review.

{¶84} For the following reasons, we conclude that the trial court's erroneous instruction is cured by our independent reassessment of the sentence. See *State v. Cook* (1992), 65 Ohio St.3d 516, 527, 605

N.E.2d 70; *State v. Awkal* (1996), 76 Ohio St.3d 324, 335, 667 N.E.2d 960; *State v. Lott* (1990), 51 Ohio St.3d 160, 170, 555 N.E.2d 293; *Landrum*, 53 Ohio St.3d at 115, 559 N.E.2d 710.

{¶85} The indictment accurately reflected the statutory language set forth in R.C. 2929.04(A)(7), and the jury unanimously found Dixon guilty of committing both specifications. See, e.g., *State v. Dunlap* (1995), 73 Ohio St.3d 308, 315, 652 N.E.2d 988.

{¶86} A similar instruction resulted in reversible error in *Penix* because the trial court compounded its error by charging the jury that the presence of multiple aggravating circumstances should be given special weight. *Penix*, 32 Ohio St.3d at 372, 513 N.E.2d 744. Cf. *Jenkins*, 15 Ohio St.3d at 199, 15 OBR 311, 473 N.E.2d 264. Here, the trial judge gave no such instruction and did not otherwise compound his initial error. Thus, the trial court's erroneous instruction did not irrevocably taint the jury's deliberative process.

{¶87} Given the dearth of mitigating evidence in this case, the jury's determination was not adversely affected by the erroneous instruction. See *State v. Palmer* (1997), 80 Ohio St.3d 543, 574-575, 687 N.E.2d 685. During the sentencing phase, the only evidence offered in mitigation was Dixon's age at the time of the offense (R.C. 2929.04[B][4]) and testimony computing the amount of jail time Dixon would serve if given a life sentence (R.C. 2929.04[B][7]). In contrast, the evidence in this matter overwhelmingly proved the aggravating circumstances.

{¶88} Aggravated murder was charged under R.C. 2903.01(A), and the jury convicted Dixon of that charge. Thus, the jury by its verdict made a specific finding of prior calculation and design.

{¶89} Therefore, we find that the trial court's instructional error does not constitute grounds for reversal.

{¶90} In a related issue not raised on appeal, the prosecutor's penalty-phase closing argument improperly referred to prior calculation and design as a third aggravating circumstance. Defense counsel did not object. We find that the prosecutor's argument did not affect the outcome of Dixon's sentencing hearing. Overwhelming evidence supported the weight of the aggravating circumstances, and mitigating evidence was generally absent in this case.

***Trial Court's Sentencing Opinion***

{¶91} Dixon contends in proposition of law No. 9 that the trial court's R.C. 2929.03(F) sentencing opinion was so fundamentally flawed that his death sentence must be vacated.

{¶92} Dixon argues that the trial court erred by failing to consider relevant mitigating evidence in its sentencing opinion. We considered this argument in connection with proposition of law No. 3. Admittedly, the trial court should have considered evidence of Dixon's incarceration for rape, which was part of Dixon's "history, character, and background" pursuant to R.C. 2929.04(B). However, our independent review of the sentence will eliminate any prejudice. See *Lundgren*, 73 Ohio St.3d at 486, 653 N.E.2d 304.

{¶93} Dixon next points out that the trial court's sentencing opinion improperly speculated about facts regarding the last minutes of the victim's life. In its opinion and judgment entry pursuant to R.C. 2929.03(F), the trial court stated:

{¶94} "When considering the manner in which Christopher A. Hammer was brutally beaten and then buried alive by this defendant; *the fear and torture the victim must have endured before he lapsed into a welcomed state of unconsciousness*, the Court finds that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt." (Emphasis added.)

{¶95} In *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, 357, 662 N.E.2d 311, we found that the prosecutor erred when he invited the jury to consider what the victim experienced and was thinking in her last moments of life "to the extent that it invite[d] the jury to speculate on facts not in evidence." See, also, *State v. Combs* (1991), 62 Ohio St.3d 278, 283, 581 N.E.2d 1071. In this case, however, the trial court's evaluation was based on evidence, not speculation. Hammer was kidnapped, repeatedly beaten, and buried alive by Dixon and Hoffner. Dixon's own confession indicated that Hammer had been "scared to death," "screaming and hollering" from the pain, and that Hammer had kept asking Dixon whether he was going to die. Dixon and Hoffner permitted Hammer, while restrained before an open grave, to smoke a final cigarette before they pushed him in and buried him alive. The deputy coroner testified that Hammer would have remained alive in his grave for eight minutes and would have been conscious for two to three minutes after burial.

Thus, the trial court did not improperly speculate about facts not in evidence.

{¶96} Dixon contends that the trial court failed to set forth the reasons why the aggravating circumstances outweighed the mitigating factors as required of it by R.C. 2929.03(F). See *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, paragraph three of the syllabus; *State v. Fox* (1994), 69 Ohio St.3d 183, 190-191, 631 N.E.2d 124. Here, the trial court set forth the two R.C. 2929.04(A)(7) aggravating circumstances that Dixon was found guilty of committing. The trial court also summarized the evidence establishing Dixon's guilt of the offenses charged. The court then outlined Dixon's mitigation evidence as including (1) his age (20) at the time of the offense pursuant to R.C. 2929.04(B)(4); and (2) testimony computing the amount of actual incarceration if the jury recommended a life sentence pursuant to R.C. 2929.04(B)(7). The trial court afforded very little weight to Dixon's age as a mitigating factor, finding that he had been a fully responsible adult at the time of the offense. The trial court found nothing mitigating about the time Dixon would spend in prison serving a life sentence and gave no weight to this factor.

{¶97} The trial court's sentencing opinion did not clearly explain why the aggravating circumstances outweighed the mitigating factors. However, the trial court's reasoning implicitly concluded that the aggravating circumstances, which were proved beyond a reasonable doubt, clearly outweighed the little mitigating evidence presented. Our independent assessment will purge any

deficiency in the trial court's reasoning. See *Fox*, 69 Ohio St.3d at 191, 631 N.E.2d 124; *Maurer*, 15 Ohio St.3d at 247, 15 OBR 379, 473 N.E.2d 768. Cf. *State v. Green* (2000), 90 Ohio St.3d 352, 363-364, 738 N.E.2d 1208.

{¶98} Finally, Dixon argues that the trial court improperly weighed the nature and circumstances of the offense against the mitigating factors. However, Dixon fails to indicate where in the trial court's opinion this alleged error occurred.

{¶99} We conclude that the trial court's consideration of the nature and circumstances of the offense did not convert those into nonstatutory aggravating circumstances. *State v. Spirko* (1991), 59 Ohio St.3d 1, 11-12, 570 N.E.2d 229. See, also, *Bradley*, 42 Ohio St.3d at 148, 538 N.E.2d 373 (trial judge may rely on and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors); *Stumpf*, 32 Ohio St.3d at 99-100, 512 N.E.2d 598. Here, the trial court correctly identified the two R.C. 2929.04(A)(7) aggravating circumstances specified in the indictment that Dixon had been found guilty of committing. See *State v. Clemons* (1998), 82 Ohio St.3d 438, 447, 696 N.E.2d 1009; *State v. Hill* (1995), 73 Ohio St.3d 433, 441, 653 N.E.2d 271.

{¶100} Based on the foregoing, we reject Dixon's proposition of law No. 9.

### *Cumulative Error*

{¶101} In proposition of law No. 11, Dixon contends that the cumulative effect of errors committed during his trial requires reversal of his

conviction. Dixon's argument merely restates his previous propositions of law. Dixon received a fair trial, and any errors committed during trial were harmless or nonprejudicial. See, e.g., *State v. Goff* (1998), 82 Ohio St.3d 123, 140, 694 N.E.2d 916. "Such errors cannot become prejudicial by sheer weight of numbers." *State v. Hill* (1996), 75 Ohio St.3d 195, 212, 661 N.E.2d 1068, citing *State v. Davis* (1991), 62 Ohio St.3d 326, 348, 581 N.E.2d 1362. We therefore reject proposition of law No. 11.

***Constitutional Issues***

{¶102} Dixon contends in proposition of law No. 12 that Ohio's death penalty law misapplies R.C. 2929.05(A) by requiring courts to limit proportionality review to those cases where the sentence of death has been imposed. This claim is rejected on the authority of *Steffen*, 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus. See *State v. Murphy* (1992), 65 Ohio St.3d 554, 583, 605 N.E.2d 884; *State v. Davis*, 62 Ohio St.3d at 351, 581 N.E.2d 1362. But, see, *State v. Murphy* (2001), 91 Ohio St.3d 516, 562, 747 N.E.2d 765 (Pfeifer, J., dissenting).

{¶103} In proposition of law No. 13, Dixon argues that imposition of the death penalty upon him is "freakish, capricious, and arbitrary." We reject this proposition. See *Bey*, 85 Ohio St.3d at 502-503, 709 N.E.2d 484.

{¶104} We also deny Dixon's proposition of law No. 14. Ohio's death penalty scheme is constitutional. See *Evans*, 63 Ohio St.3d at 253-254, 586 N.E.2d 1042; *State v. Smith* (1991), 61 Ohio St.3d 284, 294, 574 N.E.2d 510; *State v. Lott* (1990),

51 Ohio St.3d 160, 170, 555 N.E.2d 293; *State v. Taylor* (1997), 78 Ohio St.3d 15, 32, 676 N.E.2d 82; and *State v. Jenkins* (1994), 15 Ohio St.3d 164, 177-178, 15 OBR 311, 473 N.E.2d 264.

## *INDEPENDENT SENTENCE EVALUATION*

### *Penalty Hearing*

{¶105} Dixon presented little in the way of mitigation evidence. Defense counsel established that Dixon was 20 years old at the time of the offense. See R.C. 2929.04(B)(4). In addition, Sally Ann Walters, Chief of the Bureau of Sentence Computation for the Ohio Department of Rehabilitation and Correction, testified as to the length of time that Dixon would remain incarcerated should the jury not recommend a death sentence. See R.C. 2929.04(B)(7).

### *Sentence Evaluation*

{¶106} After independent assessment, we find that the evidence proves beyond a reasonable doubt the two R.C. 2929.04(A)(7) aggravating circumstances charged against Dixon. Dixon purposely caused the death of Hammer during a kidnapping and an aggravated robbery and was a principal offender in the aggravated murder. See *State v. Keene* (1998), 81 Ohio St.3d 646, 655, 693 N.E.2d 246 (there can be more than one principal offender). See, also, *State v. Stojetz* (1999), 84 Ohio St.3d 452, 458-459, 705 N.E.2d 329.

{¶107} We find nothing in the nature and circumstances of the offenses to be mitigating. Dixon, codefendant Hoffner, and the victim were friends and former housemates. Dixon and Hoffner

killed Hammer in order to steal his car. Hammer was brutally beaten, bound to a ladder, and robbed. When attempts to break Hammer's neck failed, Dixon and Hoffner drove him to a wooded area, permitted him to smoke a final cigarette, said a prayer, and then buried him alive. Dixon then assumed Hammer's identity and sold his car.

{¶108} In mitigation, the defense counsel presented no specific evidence regarding Dixon's history, character, and background. The defense did attempt to introduce evidence regarding Dixon's arrest and incarceration on rape charges. The trial court erred in excluding this evidence. However, we conclude that this factor has little, if any, relevance to whether Dixon should be sentenced to death. See *Holloway*, 38 Ohio St.3d at 242, 527 N.E.2d 831. See, also, *White*, 85 Ohio St.3d at 448, 709 N.E.2d 140 ("In Eighth Amendment jurisprudence, mitigating factors are facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death"). In addition, during the trial phase, minimal facts regarding Dixon's history, character, and background were presented. None of this evidence is mitigating.

{¶109} Dixon did not present any evidence on the remaining statutory mitigating factors. Thus, the following factors are inapplicable: R.C. 2929.04(B)(1) (victim inducement), (B)(2) (duress, coercion, or strong provocation), (B)(3) (mental disease or defect), (B)(5) (lack of significant criminal history), and (B)(6) (limited participation).

{¶110} Dixon was 20 years old at the time of the offense. Therefore, we accord some weight to his

youth under R.C. 2929.04(B)(4). *State v. Stallings* (2000), 89 Ohio St.3d 280, 300, 731 N.E.2d 159 (age of 20 entitled to some weight in mitigation); *State v. Baston* (1999), 85 Ohio St.3d 418, 431, 709 N.E.2d 128 (age of 20 entitled to some weight).

{¶111} Finally, we decide that the testimony regarding the sentencing computations is entitled to no weight in mitigation. *White*, 85 Ohio St.3d at 448-449, 709 N.E.2d 140 (length of incarceration to be served before parole eligibility is not a mitigating factor for Eighth Amendment purposes, nor is excluding information regarding parole eligibility violative of Due Process in this case). See, also, *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, at ¶ 114-119.

{¶112} After considering the fact that the trial court improperly instructed the jury regarding the aggravating circumstances in this case and the other penalty-phase errors stated, we nevertheless decide that Dixon's death sentence should be affirmed. Based on the evidence, the aggravating circumstances of murder during a kidnapping and robbery outweigh Dixon's minimal mitigating evidence. Therefore, the death sentence is appropriate in this case.

{¶113} Finally, the death penalty imposed here is proportionate to death sentences approved in other cases involving murder accompanied by kidnapping and aggravated robbery. See, e.g., *State v. Coley* (2001), 93 Ohio St.3d 253, 273, 754 N.E.2d 1129; *Moore*, 81 Ohio St.3d at 44, 689 N.E.2d 1; *State v. Henness* (1997), 79 Ohio St.3d 53, 69, 679 N.E.2d 686; *Cook*, 65 Ohio St.3d at 531, 605 N.E.2d 70; and *Roe*, 41 Ohio St.3d at 28-29, 535 N.E.2d 1351.

{¶114} Accordingly, we affirm the convictions and sentences including the sentence of death.

Judgment affirmed.

MOYER, C.J., RESNICK, F.E. SWEENEY, O'CONNOR and O'DONNELL, JJ., concur.

LUNDBERG STRATTON, J., concurs in part and dissents in part.

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LUNDBERG STRATTON, J., concurring in part and dissenting in part.

{¶115} Although I concur with the majority in affirming the defendant's convictions and sentence, I dissent with respect to two issues. First, I dissent from the majority's decision that the trial court's exclusion of evidence regarding Dixon's prior incarceration on rape charges was harmless error. I would find no error at all. Dixon was charged with a rape that, it was discovered after he had spent several months in jail, he did not commit. The majority concludes that the trial court should have permitted this evidence to be submitted for the jury's consideration as a mitigating factor pursuant to R.C. 2929.04(B) because it fits within the "history, character, and background of the offender."

{¶116} I dissent from this conclusion. Although in this instance it was the defendant himself who sought the admission of this evidence, I would nonetheless find that this evidence was irrelevant and added nothing mitigating about his "history, character, and background." Therefore, I

believe that the trial court properly excluded this evidence.

{¶117} Second, I dissent from the majority's conclusion that "prior calculation and design" should never be used in the conjunctive with "principal offender." The majority cites State v. Penix (1987), 32 Ohio St.3d 369, 371, 513 N.E.2d 744; and State v. Holloway (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831, fn. 2.

{¶118} In Penix, this court held that "[p]rior calculation and design is an aggravating circumstance only in the case of an offender who did not personally kill the victim. Thus, the criteria set forth in R.C. 2929.04(A)(7) are constructed in the alternative. If the aggravated murder was committed during the course of one of the enumerated felonies, then the death penalty may be imposed only where the defendant was the principal offender (i.e., the actual killer), or where the defendant was not the principal offender, if he committed the murder with prior calculation and design. The language of the statute provides that these are alternatives which are not to be charged and proven in the same cause. Thus, if the defendant is found to be the principal offender, then the aggravating circumstance is established, and the question of whether the offense was committed with prior calculation and design is irrelevant with respect to the death sentence." Penix, 32 Ohio St.3d at 371, 513 N.E.2d 744.

{¶119} Although this court has continually cited Penix for the proposition that "principal offender" and "prior calculation and design" are mutually exclusive, I have always disagreed with the

court's interpretation of R.C. 2929.04(A)(7) in Penix. I believe that the General Assembly intended that when both factors are present, i.e., the defendant is the principal offender and the defendant committed the murder with prior calculation and design, the jury should hear evidence of both and should consider evidence of both when weighing the aggravating circumstances and mitigating factors.

{¶120} I believe that our court misinterpreted R.C. 2929.04(A)(7) in Penix. I would find that the principal-offender factor and the prior-calculation-and-design factor were not intended by the General Assembly to be mutually exclusive. Rather, I believe that the legislature meant that when the principal-offender factor is not present in the case, the state can still use (A)(7) if it can prove that the defendant committed the aggravated murder with prior calculation and design. But if both factors are present, both can be considered. Clearly, a defendant can be a principal offender while committing the aggravated murder with prior calculation and design. It is irrational to hold otherwise. I believe that it is confusing to prohibit a jury from considering both factors in its decision as to whether to impose the death penalty.

{¶121} Although the majority finds that this error was cured by our independent reassessment of the sentence, I would find that no such error occurred. This court should clarify Penix to establish that under R.C. 2929.04(A)(7), the state must prove either that the defendant was the principal offender or that the offender acted with prior calculation and design, but if both facts are established, the jury may

consider evidence relating to both aggravating circumstances.

{¶122} Thus, I concur in the majority's conclusion with respect to affirming the convictions and sentence, but I respectfully dissent from the majority decision on the issues outlined above.

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Julia R. Bates, Lucas County Prosecuting Attorney, and Craig T. Pearson, Assistant Prosecuting Attorney, for appellee.

Jeffrey M. Gamso and Annette L. Powers, for appellant.

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## APPENDIX F

### FIRST INTERVIEW WITH ARCHIE DIXON

Kulakoski: You've known Chris for how long now.

Dixon: About two or three years.

Kulakoski: And where did you meet him.

Dixon: I met through a buddy of mine, Jim Felt.

Kulakoski: You didn't go to school together or anything like that.

Dixon: Jim just came up to me one day and said there was (inaudible) cause it was pretty big and he wanted to know if I knew anybody that could take care of it, if Jim knew anybody so they came and got me.

Kulakoski: At Olga's restaurant.

Dixon: Yeah in Franklin Park.

Kulakoski: Franklin Park, OK. Again this was a couple of years ago. That's how you met up with Chris and more or less became friends at that point or . . .

Dixon: Yeah.

Kulakoski: Or you just kind of started associating with him . . .

Dixon: We started associating then me and Jim had a problem over at Ottawa Lanes one night cause he was messing with

my fiancee then it was like, alright man, he said I'll talk to you later about it and then I went over there and I got an assault charge because I wanted to talk to him and he kept pushing me backwards.

Kulakoski: Jim was.

Dixon: Yeah, I told him not to put his hands on my chest anymore, he did it again. I just tripped him up on the ground and picked him up by his throat and I had to go in to court for it.

Kulakoski: What's his last name.

Dixon: Felt.

Kulakoski: Do you see him anymore.

Dixon: Now and then up to the pool hall.

Kulakoski: Over this 2-3 year period with Chris did you guys go and do things together or hang out.

Dixon: Not really. We didn't really do anything that much because one of Chris's good friends, Ed Ferrari, me and him don't get along at all and at that time I was with my daughter's mother and my daughter all the time which was my fiancee. Me and her were together from the time . . .

Kulakoski: This is the gal who lives over on McGregor.

Dixon: No, this is a girl I use to date a long time ago and then after about a year

and half with her, I ended up doing that eight months on false charges that I had just got out in May for.

Kulakoski: Did she and her mother charge you or somebody else.

Dixon: No, somebody else.

Kulakoski: What were you charged with.

Dixon: Rape and Aggravated Burglary.

Kulakoski: And that was cleared up by. . .

Dixon: DNA testing.

Kulakoski: DNA testing cleared you on that.

Dixon: And then she left me about a month in the middle of my time in Lucas County and started going out with somebody else and then I got out after eight months and Chris, ran into him a couple of times, talked with him and then there about I'd say end of July, beginning of August he come and talked to me and we started hanging around together up at the pool hall and partying all the time together. And then he ended up getting thrown out of his house. I told him he could stay at my house which is my girlfriend's house until he could get back into his mom's and dad's or find another place.

Kulakoski: What's her name again over there on McGregor.

Dixon: Kirsten.

Kulakoski: How long have you known Kirsten.

Dixon: About 4 1/2-5 months.

Kulakoski: So one of those kids are you kids.

Dixon: Right, none of those.

Kulakoski: So was she previously married or just got a boyfriend.

Dixon: She just had boyfriends living with her there.

Kulakoski: So again things kinda got a little tighter you say in July or August between you and Chris.

Dixon: Right. He kinda like moved in and . . .

Kulakoski: What kind of problems was he having with his parents.

Dixon: He just, his dad found a bag of week in his room and a bowl and a bunch of other paraphernalia.

Kulakoski: Was he smoking the stuff at home.

Dixon: Yeah. He was smoking the stuff all the time. I mean I didn't see Chris a day without being high.

Kulakoski: Were his parents kind of picking up on that.

Dixon: Not really because he really, what I seen of Chris even when he was living at home or I was hanging with him, he'd show up at the house to get his mom's J.C. Penney's card or Lions card, go to the mall, buy a bunch of stuff and take the card back while they were at work

and then go out partying and that and then . . .

Kulakoski: What was he doing, refunding the stuff then or . . . .

Dixon: No he was just taking it buying a bunch of clothes and that and _____ some tires for his car and stuff like that.

Kulakoski: Was he working very much at this time.

Dixon: Yeah, he worked at Nick and Jimmy's almost every night and Olga's Kitchen. The days he wasn't working at Nick and Jimmy's he was pulling doubles at Olga's.

Kulakoski: Even though he was smoking all this stuff he was still able to work that much.

Dixon: He sold a lot of his dope at work.

Kulakoski: Where at Nick and Jimmy's.

Dixon: Yeah. At Nick and Jimmy's and Olga's to a couple of black guys.

Kulakoski: What was he selling, just grass.

Dixon: Yeah.

Kulakoski: He didn't get involved in anything else.

Dixon: Nothing else.

Kulakoski: So it was about this time July or August when he moved in with you.

Dixon: I'm not sure when it was that he moved in with us. He was only there for

maybe 2-3 weeks at the most if that, if that.

Kulakoski: Was he paying any rent or buying food or anything.

Dixon: He's buy food and stuff like that but I told him he had a place to stay until he found another place or was back with his parents. Same with Tim and Tim's just kind of been there every since.

Kulakoski: How long has Tim lived there.

Dixon: About 2 months, 2-3 months. I'd say more than 2 months.

Kulakoski: Was Chris actively looking for an apartment or anything.

Dixon: Yeah. Him and I and Tim went out looking for apartments and they were trying to get one together.

Kulakoski: Now Alex was the one that went out to Colorado.

Dixon: Right.

Kulakoski: Do you know his last name.

Dixon: No I don't. All I know is Alex. He'd come over . . .

Kulakoski: How old was he.

Dixon: 18-19. I think matter of fact he just turned 18.

Kulakoski: White male.

Dixon: Yeah.

Kulakoski: Do you know what high school he went to.

Dixon: I don't know where _____ would go, either Northview or Southview.

Kulakoski: You say Carlos took him out to Colorado and then came back. How old is Carlos.

Dixon: I'm not real sure.

Kulakoski: Well rough ballpark figure.

Dixon: Between 17 and 20.

Kulakoski: Did he go to school out in Sylvania.

Dixon: Yeah, I believe so. I didn't really talk with him.

Kulakoski: Did Carlos live on, you don't remember Carlos though.

Dixon: No.

Kulakoski: Alex lived on Acres Road.

Dixon: Right. The only reason I know that is we went over to one of Alex's parties on time over to his ma's house and he'd come over with Chris to my house and smoke dope and sit around (inaudible) party tonight but I didn't really talk to him that much because they were more or like the new hippy fad people, stuff like that.

Kulakoski: Was Carlos a white kid.

Dixon: Yeah.

Kulakoski: How tall was he.

Dixon: Not really built at all. He's kind of like skinny. He use to wear these real big baggy clothes that makes him look a lot bigger.

Kulakoski: What kind of car did he have.

Dixon: Everytime I seen him, he had a little gray car, looked like a foreign ___. Until the last time I seen him, I just seen him the other day up at Speedway on Alexis and Clover. He had like a little blue Nova (inaudible).

Kulakoski: Can you get back to Chris. We were talking earlier and you mentioned that in September is when he started doing some kind of weird things. Why don't you relay those again one more time.

Dixon: I mean like, like I said, he'd come in the house and he just, he kinda like just be looking (inaudible) he would close all the curtains in the house, almost everytime he came in the house and then the one time Tim walked in on him and he was all curled up in the corner right there by the back door where that little stereo thing is and then right there in that little corner we have a phone right there, he was curled up in that corner right there watching the door and talking with my girlfriend on the phone saying people were after him. I didn't get home until later on that night. I was out with a couple of my buddies.

Kulakoski: Did he tell your girlfriend who was after him.

Dixon: I don't know if he did or not. She never told me if he did or not.

Kulakoski: What's her name.

Dixon: Kirsten.

Kulakoski: He was in the house on McGregor talking to her on the phone.

Dixon: Right. She was out on the line. She was out, her mom's, people over her mom's were like good friends of theirs, they raced, one of her boyfriends races and her friends out there own a fireworks shop and they needed someone to run it while they were up at the race so Kirsten went out there to do that.

Kulakoski: But he told her that somebody was after him.

Dixon: Right.

Kulakoski: But he never told you who it was.

Dixon: Nope. Never told Tim neither. He just said it was four guys in trench coats. That's all he said. But I don't know if you can believe it or not because me and Time, I had a buddy of mine talking to me about how some guy up in Canada had ripped him off over some good money and Chris kinda stopped in the middle of Secor Road like Secor, Alexis in the middle of the intersection about

1:30-2:00 in the morning just sitting there shaking. I looked and him and said what's your problem. He goes I was in on that. And then I said well just drive, get out of the intersection man. And we had to take over driving for him because he was shaking so bad when I said something like that to him. And then he just, I thought about it, well I said don't worry about it, I said I don't know nothing about it. You telling me something I don't know nothing. He tells me something and I don't know nothing. And we just drove back over to the house and screwed around a little bit and he wanted to go talk to my sister.

Kulakoski: You said he was going out with your sister.

Dixon: He was trying to. My sister wasn't giving him a real good chance.

Kulakoski: But you think that this is why he wasn't telling you everything is because of your sister.

Dixon: I don't know. Because usually he told me just about everything because if he had a problem he'd come and get me or Tim, that's the same way with almost everybody up at High-Q. If they had a problem they'd come in and talk to me or Tim like if some people messing with their friends out in the parking lot they'd come in and talk to me or Tim

and we'd go outside and get it broke up or either taken care of. Then it was like, cause my reputation around there isn't real good in that neighborhood.

Dixon: I'm known as a fighter cause that's all I've done and that's why Chris kinda like I think hung to me and Tim cause me and Tim just, somebody comes up in our face we ended up fighting and Chris, I mean you could go boo to the guy and he'd take off running. I don't care if it was a little guy smaller than him. You said boo to him and he'd take off running.

Kulakoski: You'd mention something about Chris talking about going down to Tennessee. What was that about.

Dixon: He just said he wanted to get out of Toledo. Him and his parents weren't getting along. He wanted to get out of Toledo so he could go down there and go to the Saturn plant and work.

Kulakoski: Had he made any contacts down there to see about getting employment or anything.

Dixon: He said he had people down there he could get in touch with. He had a friend he could live down there for free but he never mentioned the name and that's what I kept saying like, like when that time a buddy of mine had told me that stuff about some guy up in Canada robbing him of a lot of money. He just

throws up, I was involved in that and I never heard no more about it.

Kulakoski: You don't know the names of any of the people that were . . .

Dixon: No, I mean its like well Chris if you did it, where's all the money at. And he clammed up after that.

Kulakoski: Did Chris ever show very much money around.

Dixon: No, other than his tips at work. Cause I worked one night at Nick and Jimmy's with a parking lot party with him and he and somebody helped me bus tables. We cleared over $80 in tips from the waitresses. And that was like, and that was all he ever did. He worked constantly.

Kulakoski: You had mentioned that he had left his car, he had talked earlier about leaving his car. What was that conversation about.

Dixon: Before he left the first time when he wanted to leave, when he took off walking and got to Ottawa Hills and came back.

Kulakoski: Was this in September also.

Dixon: This was just before he moved out of the house. He was still living at the house. The electricity got shut off, I think on the 9th of September. So this had to been around end of August, beginning of September and he threw me the car

keys and birth certificate and social security number, all that on the table. He said sign everything over to your sister.

Dixon: Well, then when he moved out and everything after the last time I seen him, he called me up and goes hey, Arch, I'm half way through my trip finally. He goes the car is sitting over at _____ apartments. I said, I know I've seen it over there. I thought you were just up at Brian's apartment.

Kulakoski: Now _____ apartment is where.

Dixon: On Alexis just past Talmadge.

Kulakoski: And this was a girlfriend of yours, right.

Dixon: Right she ended up moving out. I didn't go over there that much anymore. Except I went over there to see one of my friends and his car was there and it was parked where he always parked to go to Brian's apartment which is where he brought dope from. And I figured he was just up there hanging out over there a lot. And I don't go up to Brian's apartment because Brian shorted me on some stuff and I've been looking for him and that.

Kulakoski: You said that the last time you physically saw him though was the High-Q Billards.

Dixon: Right.

Kulakoski: And this was sometime in September. This was after the electricity got turned off on the 9th.

Dixon: Yeah this was towards maybe the 20th or 21st of September, somewhere around there.

Kulakoski: How long was the electricity turned off for.

Dixon: I can't say for sure, maybe week and a half, two weeks. (inaudible) electricity off.

Kulakoski: But Chris was there when the electricity was turned off.

Dixon: Right he was there. It got turned off one night, he was there.

Kulakoski: Did you or Kirsten ask him for money to get the power turned back on.

Dixon: Yeah and he moved out. It was like, well no big deal. We let it go at that and then she got the money from her brother to get it turned back on.

Kulakoski: And you say it was turned back on when.

Dixon: About a week and a half, two weeks later, roughly, I can't say for sure.

Kulakoski: So you last saw him at the billard place and what did he say to you in there.

Dixon: He just sitting there talking with me. He really didn't say much. He just said I'm going to cruise around to se who's

up here. He asked me if my sister was home or in the pool hall. I said if she ain't in the pool hall I don't know if she's home or not. I made a comment that I'm not her babysitter.

Kulakoski: But Chris was trying to date your sister.

Dixon: Yeah.

Kulakoski: What's her name.

Dixon: My sister's name.

Kulakoski: yeah.

Dixon: Sandra Dixon.

Kulakoski: Where does she live.

Dixon: 4204 Albar.

Kulakoski: How old is Sandra.

Dixon: 16, I believe.

Kulakoski: What school does she go to.

Dixon: Whitmer, I think she's 16.

Kulakoski: Did Chris actually ever date her, did they go out or did he just try . . .

Dixon: He was trying to date her, I mean they went out a couple of times but I don't know if anything broke loose. I mean he bought her roses over and stuff like that. It was like she really didn't acknowledge him too well.

Kulakoski: So the last conversation at the pool hall though, what did he tell you.

Dixon: He really didn't tell me much. He said just screwing around, what you up to and I said nothing much and he goes, your sister in there. I said no. He goes is she at home. I said I don't know, I'm not her babysitter and he pulled away.

Kulakoski: But you say that he called you later on telling you about his car being over by _____.

Dixon: Right.

Kulakoski: How long after the conversation at the pool hall did he call you.

Dixon: It was about 4-5 days cause it was towards the end of September.

Kulakoski: What did he tell you about the car.

Dixon: He just said the care was sitting over there. He goes do what you got to do with it.

Kulakoski: And you say you had his social security card.

Dixon: Has his social security and his birth certificate. And I sold the car I got rid of that.

Kulakoski: What did you do with those items.

Dixon: I threw them away in a dumpster behind High-W. But the only thing is like when Ottawa Hills pulled me over I still had the i.d. I was looking for it and it was stuck in between the seats in my car and Ottawa Hills police found it so,

cause I was looking for that to throw away with everything.

Kulakoski: What did they find now, the Ottawa Hills police.

Dixon: The fake i.d. that I used to sell his car, to get the title.

Kulakoski: Which kind of fake i.d. was that.

Dixon: It was a state i.d.

Kulakoski: Where did you get that at.

Dixon: Saxon Square.

Kulakoski: What kind of i.d. did you have to show them to get this i.d.

Dixon: All I had to do was show them was the birth certificate and the social security card.

Kulakoski: That's how you sued Chris'.

Dixon: Uh huh (yes).

Kulakoski: And that's how you got the car. And you say that when Ottawa Hills stopped you, which card was in the car.

Dixon: They found the fake i.d., the state i.d.

Kulakoski: Did they seize that.

Dixon: Yeah, I've got to go to court on the 12th for forgery on that because I didn't present it to them. I'd been looking for it to get rid of it and they found it in between the seats and they said well you didn't present it to us so we can't hold him on it and they said I'd find out

in court and I had to go to court for no operator's license and driving with my bright lights on. That's why they pulled me over because I was driving with bright lights. And they said well you'll find out in the paper about what's going on with this and I came into court for a charge and they said I had two warrants out for me. And I was like two warrants. One was forgery and the other one was criminal damage. And my attorney got all of those up for trial on the 14th. Forgery, I've got to go to court on the 4th and then the other two I got court because one's assault and the other one is criminal damage. I got to go the 14th.

Kulakoski: How much money did you get for the car.

Dixon: $2,800.

Kulakoski: What did you do with it.

Dixon: Blew it up at the pool hall basically.

Kulakoski: I thought you were a good pool player.

Dixon: Well if I'd walk in there like I am right now, no money in my pocket or just a little bit of change (inaudible) I'd shoot real good. If I got money on me, I don't care if I win or I lose. I just shoot. I just screw around. I just blow money here and there. I paid off my daughter's mother, the $150 that I owed her. There was another one of my friend's

birthday up there. I gave her $20. I had it for awhile. I mean I didn't go right through it like blam. But I came across the TA that Tim's driving for $400. It was a buddy of his so I bought that. Put a master cylinder in it and then Tim ended up buying that off of me and I went out to a used car lot and that's where I bought the Cordova for $300.

Kulakoski: That still doesn't describe where the money went.

Dixon: It all just went like, I mean I was through it within a month. I went out and bought me a new pair of boots and stuff like that, just little stuff. And it just ended all racking up $100 here, $100 there, it all just went.

Kulakoski: Do you have any questions.

Scanlon: Who picked you up at the car dealer when you dropped the car off.

Dixon: Tim was there with me.

Scanlon: He was at the dealership with you.

Dixon: Well, him and _____ because he knew what was going on somewhat and he had a friend that lived over there and he said that he would be over there during that day and when he seen me over there he stopped. He didn't know what car dealer I was going to or whatever, cause I just had plans of walking. And he seen me there and he

stopped and him and his buddy gave me a ride.

Scanlon: What's his buddy's name.

Dixon: Mickey, I don't know his last name. All I know is Mickey.

Kulakoski: That's a friend of Tim's.

Dixon: Yeah.

Scanlon: Could it be Alexander.

Dixon: I have no ideal but it was like they drove by and they seen me and they stopped and they started looking at a Mustang that was sitting there and he asked me if I needed a ride home and I said yeah and got in the car with them.

Scanlon: Was Tim driving.

Dixon: No.

Scanlon: Tim was a passenger...what kind of car was it.

Dixon: _____ Cavalear _____.

Scanlon: Do you know the kid that was driving it.

Dixon: I know him but I don't know him all that well. Me and him and Tim were friends. Tim works for him cutting grass because he owns his own lawn service.

Scanlon: Where does he live.

Dixon: I think he, I don't know, his mom lives over on McCord and every now and then

everytime I seen him he's over on Holland living with a buddy of his.

Scanlon: Whereabouts on McCord.

Dixon: I think its before Central, between Sylvania and Central.

Scanlon: You say he has a lawn service.

Dixon: Yeah.

Scanlon: Do you know the name of it.

Dixon: Nope.

Scanlon: How did the car (inaudible).

Dixon: In a check.

Scanlon: Where did you go from there.

Dixon: I had him stop at the bank right up the road, the first, the bank that he told me that people always cash their checks at. They know (inaudible) have a problem cashing it. I'm trying to think of the name of the bank. I don't remember the name of it. It's just right up over the overpass on Central.

Scanlon: Do you know the cross street.

Dixon: It's before McCord. Right there, there's a car dealer behind it I believe.

Scanlon: Fifth Third?

Dixon: Yeah.

Scanlon: How did you know they would cash the check in there.

Dixon: The state i.d. and the check was made out in Chris' name with the state i.d. that I had made of Chris' name.

Scanlon: when did you have state i.d. made.

Dixon: Let's see, Chris called me and I went down and had it made right after he called me and then I went to make the title up and they said, they asked me what year I bought the car and I gave them the year and then they looked it up and they didn't find it. So they said I had to go down and get my license plate number, take it down to the license bureau with my, give them my license plate number, they gave me a title number. So I did that, went back up to the title bureau and my title number and they ran it and gave me a title for it.

Scanlon: How long did you have that title before you sold the car.

Dixon: I would say roughly 2-3 days, just taking it around the car lots seeing who would give me the most and like that. That car dealer I took it to they were the only ones that gave me basically what I was asking for it. I was asking $3,000 for it but it didn't have air conditioning so that cut out $200 right there.

Kulakoski: Just a minute.

Kulakoski: Arch, we just got a phone call from one of the detectives that's over there at the house and just to let us know apparently Tim's doing quite a bit of talking and I'll be real honest with you. We think there's a lot more to this than what you're telling us.

Dixon: If there's anything else is known then Tim is the only one that knows it because the only thing I know is with the car.

Kulakoski: I'll be real honest about it. What you're telling us about the i.d. we already know. We knew how you got the i.d. and we know that you used that to do the title work and to cash the check and the whole bit with the car dealership. That's all cut and dry. There's really not a whole lot of question about that or anything else. But I'll tell you the part that I'm having a great deal of trouble believing is the fact that Chris', this car which was his pride and joy he kept that thing immaculate.

Dixon: And he does have a problem with his cars.

Kulakoski: That he is just going to leave a car and take off. If he had a problem with whoever, somebody was after him he'd do the same thing that you just did, drive to a lot, sell the thing instantly, get his money and take off. There's no way that somebody is just going to take

a car that's paid off and just leave it sitting.

Dixon: He wanted it to go to my sister. He said that plenty of times in front of my mother.

Kulakoski: Well, again if that was the case, he could have had the title changed over. He could have done a lot of things . . .

Dixon: True.

Kulakoski: But just to leave a car like that and take off and then call you a couple of days later and say well here is where the car is at, do with it whatever you want, cause that was your exact words that he supposedly told you, frankly we don't believe.

Dixon: OK, that's fine.

Kulakoski: And you know Arch, I'm just letting you know right now that if there's more to this, now's the time to let us know because . . .

Dixon: I told you everything I know about it.

Kulakoski: Well, has Tim said anything about Chris.

Dixon: Tim's not one much on talking. Me and him lately have not been much on words because the other night his brother screwed me around, I'm going hunting.

Dixon: I paid his way to a movie because he was going to take me out hunting the next day, the two of us were going cause

he hadn't been and he was well never mind, I'm not going tomorrow, I'll talk to you later, bye. I spent my last little bit of money on him, his movie and shit and then me and Tim argued about it because Tim was running his mouth and I said man, just shut up. I'm tired of your brother. I'm tired of your mouth. Just shut up and give me some time. We sat there and argued for a good half hour, 45 minutes last night and we talked here and there, I rode around with him yesterday with a couple of buddies at his house and just talking with them because he had to go talk with D_____, see what's going on see if D_____ cause usually they all go out drinking or whatever and I was just riding around with him because I didn't have nothing better to do. And he doesn't speak about nothing actually.

Kulakoski: Then again we think something happened to Chris.

Dixon: OK.

Kulakoski: Because I just don't believe that all of a sudden out of the clear blue he takes off, he doesn't call his parents, he doesn't call anybody else, he calls you and tells you to go ahead and take the car. This is 6-8 weeks ago and he hasn't made contact with anybody since. It just, it's beyond the realm of probability that

this is going to happen. So I think something else happened to him.

Dixon: This is understandable but everything I know I've already told you. I've been more than welcome to tell you. I mean usually like I told you, you can ask this gentleman right here cause (inaudible), I didn't even want to speak with you guys unless I had an attorney present because that eight months I did I talked to an attorney, told my side, I spent eight months for something I never did so I had no faith in the system anymore. But yet I still, like just now told you everything I know, admitted to forgery and yet still . . .

Kulakoski: Archie, that was, you're not a stupid kid. You're smart and you knew as well as we did that once we had you on, his was a cut and dry caper.

Dixon: Right.

Kulakoski: I mean there was a paper trail and we were able to follow it and that's why you're down here.

Dixon: Right, which is no problem. I understand. That's why I'm admitting. I told you everything I know about it. That's all I know.

Kulakoski: Did you have anything to do with anything that might of happened to Chris.

Dixon: I don't know anything.

Kulakoski: Do you have any knowledge at all of anything happening to Chris beside from what you told us about him saying he was going off on a trip someplace.

Dixon: No, because he, he basically came to me and Tim for protection.

Kulakoski: OK. I got a proposition for you which will clear the air real fast on this. Would you be willing to take a polygraph test about Chris.

Dixon: No I won't. Because when I took a polygraph test for that eight months that I did, I was supposed to take one so that I could get out for Christmas and the DNA test proved me innocent, lie detector test proved I was guilty. There's no way I will never get on another polygraph test because it said I was guilty, DNA test said I wasn't. I'll never take another one in my life.

Kulakoski: I can understand that. _____, do you have any questions for him.

Leiter: No, not to my knowledge. If you have any inkling or any information about Chris you really need to give it to us, you really do.

Dixon: The only thing I know is what I've said and that he wrote down is on that tape. If Tim knows anything else it's on Tim and whoever is with him. But Tim and Chris were good friends too.

Kulakoski: Does Kirsten know anything.

Dixon: She'll, she goes away on the weekends for the fireworks thing, she did it a couple of weekends. I threw parties and that's about all she knows. I mean she knows that I took the car and sold it and got the i.d. made up in Chris' name but that's all she knows.

Kulakoski: Arch, there's one thing I want to stress with you. If something happened to Chris and you had any involvement, even thought it may not have been a major role in what happened to Chris, you had any involvement now is the time to say so because if Tim starts cutting a deal over there, this is kinda like, a bus leaving. The first one that gets on it is the only one that's gonna get on. I'm just letting you know right now.

Dixon: I understand that. That's no problem, I understand that but I told you everything I know. Like I said, if Tim knows anymore then he's keeping it inside himself and not telling anybody.

Kulakoski: Now you had mentioned before when we were talking about the i.d. and the title you said that you had the title for two or three days before you went over and sold the car.

Dixon: Yeah before I actually got rid of the car.

Kulakoski: I don't believe that's correct is it, _____.

Dixon: I know I had the car before I went and got rid of it because I checked a bunch of car lots. Then I'm not real honest, when I had the title because to tell you the truth, I can't remember the exact day I went and got it as to comparison of when I had the car.

Kulakoski: Did you get the title the very same day you got the title you went over and sold the car.

Dixon: I probably did but I can't remember for sure because I know I took it to a couple of car lots, checking around for prices and that, because I was over at Wernet's Corner, I was over at Joe Grogan's and a couple of other places.

Kulakoski: Archie, I'm just not believing that Chris is going to leave his social security card.

Dixon: I understand that.

Kulakoski: I believe you said there was another piece of i.d. that he left, his birth certificate with you just to get rid of a car. I just don't believe that. No. 1, if you're going away and you're supposedly going away to get a job down in Tennessee you're going to have some type of identification. He didn't have his driver's license, the court had seized that.

Dixon: Yellow piece of identification has been copied anyway.

Kulakoski: The birth certificate and the social security card.

Dixon: Yep, that's all they had on him and they were copies. So if he had the real ones, he had the real ones. I told you everything I know. Now its like, same stuff that happened the last time you know. (inaudible) everything that I know and it's come back in and it's hammer time and you know.

Kulakoski: I'm not here hammering you (inaudible). We're just trying to get to the bottom of this.

Dixon: I've told you what I've known. I'm screwed out of a days worth of work. I would have been down here. I thought I had to come down here Saturday and talk to Mr. Scanlon. I don't have a car, I don't have money for a bus. I don't get paid until my jobs are done. I'm a self-employed construction worker.

Kulakoski: I thought you said you didn't work, you said you just shot pool and made money that way.

Dixon: Lately, I (inaudible). Lately all I've been doing is I'm hanging siding for a couple of my buddies. He asked me to come over and help him hang siding. Me and him got in an argument and a fight. I got out of that.

Dixon: I've been trying to get hooked up with this other guy doing drywall. I just got

a drywall job and I was supposed to go put a bid on but if I don't show up somebody else gets the bid and gets accepted. I'm screwed for money. I got a daughter to think about. That's the only reason I'm trying to get this taken care of. Now here you are telling me, Tim's saying this and Tim's saying . . . Tim can say whatever he wants cause everything I know is right there on paper and on that tape.

Kulakoski: So again just to clear the air. You don't know what happened to Chris Hammer.

Dixon: All I know is that he said he was going to Tennessee.

Kulakoski: You had nothing to do with his disappearance.

Dixon: Nope.

Kulakoski: Nothing whatsoever.

Dixon: Nothing whatsoever.

Kulakoski: And you don't know whether Tim did or not.

Dixon: Correct.

Kulakoski: Because Tim never has said anything to you about this.

Dixon: Correct. And I'm pretty sure if he would have he would have told me because me and him are like this or else I wouldn't have let him move in the house.

Kulakoski: _____, any more questions.

Ok, that'll be it for right now.

END OF FIRST INTERVIEW/TAPED
STATEMENT WITH ARCHIE DIXON

dixon1.bj

## APPENDIX G

WAIVER OF RIGHTS

Suppression Exhibit 6

[Supreme Court of Ohio
Case No. 01-0013
Date Rec'd 01/25/01]

IN REGARDS TO COMPLAINT # RB _____.
CHARGE:_____

PLACE: 212 .

DATE: 11-9-93 .

TIME: 1930 hrs. .

YOU HAVE THE RIGHT TO REFUSE TO MAKE A STATEMENT OR TO ANSWER QUESTIONS. IF YOU REMAIN SILENT, YOUR SILENCE CANNOT BE USED AGAINST YOU IN A COURT OF LAW.

ANYTHING YOU DO SAY CAN BE USED AGAINST YOU IN A COURT OF LAW.

YOU HAVE THE RIGHT TO THE PRESENCE OF A LAWYER DURING THE QUESTIONING. IF YOU CANNOT AFFORD A LAWYER, A LAWYER WILL BE APPOINTED FOR YOU BEFORE THE QUESTIONING IF YOU SO DESIRE.

UNLESS YOU ARE WILLING TO GIVE UP THE ABOVE RIGHTS, NO STATEMENT OF

YOURS CAN BE ACCEPTED AND NO QUESTIONS WILL BE ASKED OF YOU.

THE ABOVE RIGHTS STAY WITH YOU AND MAY BE CLAIMED NOW OR AT ANY TIME DURING THE QUESTIONING.

I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed: s/Archie James Dixon

Witness: s/Det. Phil Kulakoski Date: Nov. 9, 1993

Witness: s/R. Leiter Time: 7:30 p.m.

## APPENDIX H

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

Case No. CR93-7271(B)

Judge Jensen

STATE OF OHIO,

Petitioner,

v.

ARCHIE DIXON,

Defendant.

VOLUME VI OF VII

TRANSCRIPT OF PROCEEDIGNS

. . .

[1137]

EXHIBIT #46, A CASSETTE TAPE, WAS PLAYED FOR THE JURY AS FOLLOWS

- - -

DET. LEITER: Okay, This is Detective Leiter, Toledo Police. Today's date is 11-9-93. Time is 20 hundred hours right now. We're at the homicide office. With me is Detective Kulakoski and one Archie Dixon. Archie, would you say your name for the --

MR. DIXON: Archie Dixon.

DET. LEITER: Okay.

DET. KULAKOSKI: Archie, I'm going to give you your Miranda warning right now. I want you to listen. As I read each paragraph, I'd like you to answer yes or no as to whether you understand each paragraph, okay?

MR. DIXON: Okay.

DET. KULAKOSKI: You have the right to refuse to make a statement or to answer questions. If you remain silent, your silence cannot be used against you in [1138] a court of law. Do you understand that?

MR. DIXON: Yes.

DET. KULAKOSKI: Anything you do say can be used against you in a court of law. Do you understand?

MR. DIXON: Yes.

DET. KULAKOSKI: You have the right to a presence of a lawyer during questioning. If you cannot afford a lawyer, a lawyer will be appointed for you before the questioning if you so desire. Do you understand that?

MR. DIXON: Yes.

DET. KULAKOSKI: Unless you are willing to give up the above rights, no statement of yours can be accepted and no questions will be asked of you. Do you understand?

MR. DIXON: Yes.

DET. KULAKOSKI: The above rights stay with you and may be claimed now or at any time during the questioning. Do you understand?

[1139] MR. DIXON: Yes.

DET. KULAKOSKI: Okay, Arch, I'm going to show you the waiver of rights form that we went over before at about 1930 hours. Is that your signature at the bottom?

MR. DIXON: Yes.

DET. KULAKOSKI: Okay.

DET. LEITER: Archie, are you under the influence of any drugs or alcohol at this time?

MR. DIXON: No.

DET. LEITER: Okay. You have a clear mind?

MR. DIXON: Yes.

DET. LEITER: Read and write the English language.

MR. DIXON: Yes.

DET. LEITER: How far did you go to school?

MR. DIXON: GED.

DET. LEITER: So, you have a high school GED?

[1140] MR. DIXON: Yes.

DET. LEITER: Okay. We talked a little bit ago.

MR. DIXON: Yes.

DET. LEITER: And you gave us a statement; is that correct?

MR. DIXON: Yes.

DET. LEITER: Okay. Everything you told us then the truth?

MR. DIXON: Yes.

DET. LEITER: Okay. What this investigation is in regards to is a, the disappearance of one Christopher Hammer. Do you know Christopher Hammer?

MR. DIXON: Yes.

DET. LEITER: Okay. How do you know him?

MR. DIXON: Chris Hammer and I used to be friends, used to hang around all the time a little bit more there around the middle of August, late August, and I'd say more or less the [1141] beginning of August actually, and, he had me work with him at Nick & Jimmy's parking lot party because they needed somebody to help him bus tables, and he moved in with me because his parents and him had a problem. They found a bag of weed and his dad kicked him out.

DET. LEITER: When you say moved in with you, where is that?

MR. DIXON: On 3624 McGregor.

DET. LEITER: Okay. Who else lives at that residence?

MR. DIXON: Kirsten Wilkerson, Timothy L. Hoffner, and at the time Mike Elting.

DET. LEITER: Okay. About when did he move in with you on McGregor?

MR. DIXON: He moved in about middle of August.

DET. LEITER: How long did Chris live there?

MR. DIXON: A week or two. [1142] He moved out September 9th, because the electricity was turned off.

DET. LEITER: Okay. Were you and Kirsten and Tim still living there at that time?

MR. DIXON: Yes.

DET. LEITER: Okay. And you told us of an incident that took place. Was that after you moved out September 9th?

MR. DIXON: Yes, it was.

DET. LEITER: Okay. How long after that incident?

MR. DIXON: About, I'd say a week and a half, almost two weeks.

DET. LEITER: After the 9th?

MR. DIXON: Yeah, maybe even sooner than that. It seems like it was a long time but I couldn't say variation in point.

DET. LEITER: Why don't you pull your chair up here a little bit so – now, what is this incident we're talking about that's maybe a week and a half after [1143] he moved out?

MR. DIXON: Um, me and Tim Hoffner were up at Hi-Q Billiards shooting pool, and he was talking about Chris's insurance money he was going to a get from a car accident, which was $4000, but he needed Chris' birth certificate and soch number. And the only way Tim was thinking about being able to get that was by killing Chris. I didn't think he

was serious, but when Chris showed up – he had me call Chris at work and have him come up to Hi-Q because he wanted to talk to him.

DET. LEITER: Who called Chris at work?

MR. DIXON: I called Chris.

DET. LEITER: At where, where?

MR. DIXON: Nick & Jimmy's.

DET. LEITER: Okay.

MR. DIXON: And, um, Chris came down, and him and Tim talked and shooting pool at the time against a friend of mine, and Tim called me up there and he [1144] goes you want to go out dancing because I think it was a Thursday night because Eli's is ladies night out there and that's where we was thinking about going, and I said sure, and we gotta go home and change and that, and I said I'm shooting pool right now, and Chris had to run home on get his social security card and birth certificate and that so he could prove that who he was because he left it – he doesn't' have a driver's license. They had to taken, you know, he had a little card saying he could drive back and forth to work. So he drove out to Chris's house and Tim went with him and I was sitting there shooting pool. They came back and got me when I was done shooting pool. I just finished up as they walked in the door, and we went back to Kirsten's house. I was like 1:00 in the morning and um –

DET. LEITER: You were getting ready to go out somewhere?

MR. DIXON: Right, and Tim [1145] was like – we were sitting there screwing around and we

changed clothes and Tim was talking about, and I didn't think he was gonna do it because it had been like about a half hour and it was about 1:30 now.

DET. LEITER: What was he, what was he talking about?

MR. DIXON; He was just talking about how the electricity got shut off and how we used to sit around and smoke pot and stuff like that.

DET. LEITER: Now, you said he was talking about killing Chris over this insurance money. Now, how he was talking doing it?

MR. DIXON: He wasn't sure how he was going to do it. He just knew, you know, he wanted to do it so eh could get the social security card and birth certificate. So, I didn't think he was serious because, like I said, it had been a half hour, and I looked at him, and I just shook my head and he called Chris back [1146] inside and he goes, well, hey man, it's getting too late to go out there, I really don't want to go, now let's go outside and smoke some pot, I got some pot inside. We came back inside, and I went back in the bedroom and I came out and they were wrestling around. Tim had him in a head lock like this and was bouncing him up in the air trying to snap his neck. And then –

DET. LEITER: What was Chris doing?

MR. DIXON: Chris was screaming and hollering quit, quit, quit, you know, he goes, it hurts, quit. And then I noticed blood coming from his ears and the top of his head. I was like Tim he's bleeding, let him go.

DET. LEITER: How did his ears get injured and the top of his head?

MR. DIXON: From I don't know if it was the blow when he came down, because Tim was jumping his butt up in the air and everything too, to where he was [1147] throwing all his weight up and Chris's weight and then trying to snap the neck and his head hit the floor. I don't know if it was from that or from Tim squeezing his head hard enough that his hears started bleeding. And I noticed that and Tim, you know, I got time to quit and Tim grabbed him again and Tim wanted me to stab him in the neck or stab him somewhere to kill him. I was like I'm not gonna stab him, I can't do it. So Tim let him go. I got Chris into the bathroom. I told him to clean up and I said stay in here and don't leave this room. Let me talk to Tim, and I locked the door when I left and pulled it shut and that's when Kirsten goes wait a minute, let me get out of here, let me get out of here.

DET. LEITER: Where was Kirsten?

MR. DIXON: She was in the bathroom hidden underneath the shelves by the sink.

DET. LEITER: Why was she [1148] hidden under –

MR. DIXON: Because she heard the screaming and noise and she got scared and ran.

DET. LEITER: When you seen her hiding, what was she doing?

MR. DIXON: She was sitting there all curled up with her knees up to her chest and her hands over her ears. And, um, she came out of the bathroom and went back and went back into the laundry room

and hid up in there, and me and Tim sat in the kitchen talking. It was like, man, we should just let him; I says he ain't gonna tell, we should just let him go. He was like, no, fuck that, he's gonna tell. I was like we should just let him go. I said they can't really get us on nothing but assault. He goes like hell, they can get us on attempted murder. I was like I didn't do anything. I was like all he can do is assault. Let him go. He said he ain't gonna say nothing, he's scared to [1149] death, let him go. He goes no. So we took and he – I went in there again and he was pretty much well cleaned up, all the blood off of his face and had his shirt up around his head. And he kept asking me am I gonna die, am I gonna die. I said no, let me talk to Tim. I kept talking to Tim and Tim just kept getting more furiated and more furiated with me trying to talk him out of it and talk him into letting Chris leave, and he turned around and looked at me one time and said if I don't want a part of it get the fuck out and, but then I'm gonna have to come look for you basically is what he was trying to say because I know something about it.

DET. LEITER: What do you mean basically?

MR. DIXON: He didn't come straight out and say now I'm gonna have to look for you. He said – I'm trying to think of his exact word. His exact word was I was a part of it. I couldn't let him [1150] go either because I was a part of it.

DET. LEITER: He's telling you this?

MR. DIXON: Yeah, Tim's telling me this. So, we get Chris out of the bathroom an tied up. We put him in the girl's rooms, which is Brianne and

Courtney Wilkerson's room, and we tie him to this the bunk bed.

DET. LEITER: How did you tie him?

MR. DIXON: We tie him up with some old jean rags and a pair of my pants that were ripped up, and I tore them apart more and took the seaming part of them and tied him up around there. And Tim kept talking about having to get rid of him, having to get rid of him, so I showed him a place which is where the body was dug up over there on –

DET. LEITER: So where do you go? And you said you showed him a place. What do you and Tim do?

[1151] MR. DIXON: We get in Chris's car. After we put a shovel in the back, we get in Chris's car and we leave. We take and we park the car across Alexis Road, take the shovel out of the back, walk across Alexis Road, up the road a little ways and into the woods. We walk down a path a little ways until we look around and say is this good enough, and he says yeah.

DET. LEITER: Who says is this good enough?

MR. DIXON: Tim Hoffner.

DET. LEITER: And who says yeah?

MR. DIXON: Well, I asked if this was good enough.

DET. LEITER: Oh.

MR. DIXON: And Tim says –

DET. LEITER: Yeah?

MR. DIXON: Yeah, so he started digging the hole, and I'm watching make sure no lights or nobody's coming, then he goes, well let's go and the hole –

[1152] DET. LEITER: You guys take turns digging?

MR. DIXON: I dug maybe a little bit, and told him I can't do it. I mean I started to, I started the hole and I said I can't do it, and he finished it. He dug it up maybe to his waist, maybe a little higher.

DET. KULAKOSKI: How long did it take to dig the hole?

MR. DIXON: I'd say this all took about three, no it took maybe, maybe an hour it seemed, if that. I'm not real sure on the time.

DET. LEITER: What time of the day is this now?

MR. DIXON: It's still early in the morning, still dark out. It's about maybe anywhere from two to four in the morning.

DET. LEITER: Okay, so –

MR. DIXON: No, actually it's later than that because we probably [1153] never left Kirsten's house on McGregor until three-thirty, quarter to four.

DET. LEITER: To go dig the hole?

MR. DIXON: Right.

DET. LEITER: Okay.

MR. DIXON: And, um –

DET. LEITER: Now Tim wanted to know a place where he could put him?

MR. DIXON: Correct.

DET. LEITER: So you took him to a road where this –

MR. DIXON: Tim wanted to dump him in a pond or in a dumpster somewhere.

DET. LEITER: Okay. What did you say?

MR. DIXON: I said you want to get caught, don't you. I said this is me too that's gonna end up getting caught and Kirsten and her kids are gonna be gone. I was like you started, you might as well get rid of it the right way. I can't say [1154] nothing 'cuz I'm complicity, and I don't trust the court system anymore. So I showed him the place in the woods.

DET. LEITER: Okay.

MR. DIXON: I started to dig and told him I can't do it because I didn't really want that much of a part of it. He finished digging. He dug it up to about his waist. We walked back out, got in the car and we walked back across Alexis because we left the shovel there. We walked certain paces back, dropped the shovel off up into the woods. I remember the count of the paces where we left the shovel, so we didn't leave it right at where we were digging at.

DET. LEITER: What side of the path did you leave the shovel?

MR. DIXON: I'm trying to think.

DET. LEITER: If you're walking out –

MR. DIXON: If you're [1155] walking out, we left it on the right-hand side, and that's where we had stopped to smoke a cigarette. When we brought Chris back – we went back to the house, got Chris, he was in and out of consciousness.

DET. LEITER: Was he still in the bedroom?

MR. DIXON: Yeah, he's still tied up in the bedroom to the bunk bed. I untied him, sat there talking to him. He said are you guys gonna kill me. I said no Chris. And I was still talking with Tim at the time. Well, then Tim come in there. I said Tim you go talk to him, and I walked out. I walked into the kitchen and smoked a cigarette because at this point I didn't know if I was coming or if I was going.

And I started hearing a banging noise again, and Kirsten started to head for the room and I pushed her back. I said you should just leave and then I walked in around the corner to look in the girl's room, Brianne and Courtney Wilkerson's [1156] room, and here's Tim trying to snap his neck again.

Well, I walked back out, and Tim came out and he had blood and that all over his leg from when they were in the front room when Tim was trying to break his neck, and then he had a little bit more fresh blood on him, and, um, he goes well let's do this, let's tie him and get him going while he's unconscious. Well, when he said that, I went in there and we started tying him up and while we were tying him up, I checked his pulse and he still had a pulse but it was real weak.

DET. LEITER: What did you tie him up with this time?

MR. DIXON: Same thing, jeans, torn up jeans. So, we put him in the back seat of his car, and drove out there, and we carried him back on the pathway, and just about when we got to the shovel and set him down to get the shovel he came to, and he started talking, and I [1157] told him, I said, I told you not to pull the gag off Chris, and, um –

DET. LEITER: Who said that?

MR. DIXON: I did.

DET. LEITER: You said to Chris?

MR. DIXON: Yeah, and um, we sat there and smoked a cigarette 'cuz he asked for a cigarette. We smoked a cigarette, said a prayer, and I said well I'll be right back Tim and I walked over to take a piss in the woods. The shovel was already back, and I already walked down and put the shovel in the dirt by the grave.

DET. LEITER: Well, I thought you discarded the shovel.

MR. DIXON: Well we picked it up on the path where we stopped to smoke a cigarette. We, you know, stopped to pick up the shovel and I walked down and stuck it –

DET. LEITER: You picked it up again?

[1158] MR. DIXON: Right.

DET. LEITER: Where you discarded it the first time?

MR. DIXON: Correct.

DET. LEITER: And carried it back?

MR. DIXON: Carried it back over to the grave and stuck it in there. I was over in the woods about the same place where the shovel was, taking a piss, and then I heard Chris yell and I heard Tim jump.

DET. LEITER: You heard. Did you see or hear him?

MR. DIXON: Well, I seen him go down in the hole but I heard it first and I seen Tim standing in the hole on Chris's face, because I heard Chris yelling and I turned around and look and Tim was in the air and he landed down on Chris's face.

DET. LEITER: Okay. You guys, did both of you put Chris in the hole before you go take the piss or –

[1159] MR. DIXON: No. The hole from where we were at, where the shovel was, it was maybe from me to, um, the Detective right there. It wasn't that far at all.

DET. LEITER: You're indicating about eight feet?

MR. DIXON: Correct. It wasn't that far at all. And Chris was maybe 120, 125 pounds, I mean, but I turned around and looked, Tim started putting dirt in and he goes hurry up and put dirt in and Tim had the shovel while he's standing in Chris's head like this just raking dirt in, and then I went over and Chris's foot came up and I held his foot down and put some dirt over top of it and held it down while Tim put more dirt, and then I let go and walked away. And Tim started walking over and everything. I walked one way. He walk this way, I walked back

one way and, you know, just kept alternating to pack the dirt in and then we left, and we went –

[1160] DET. LEITER: So you were both alternating over the site packing dirt down?

MR. DIXON: Correct. And then we went, got in the car and left and then there for a while we discussed, you know, who was going to do what, who was going to take and get the I.D. all made up. I said Tim you're the one that wanted the insurance money from Chris's auto accident, I said, I really don't want that much of a part of it anymore.

And then the day we went to get rid of it, you know, get the ID and everything made up, Tim was being real hesitant about it. I was like, Tim, we've got to get rid of this stuff, just get rid of it. We went down to get a drink and take a piss, and then it was at the Marathon station, over on McCord, I believe it was McCord and Sylvania, and he goes – I said well, hell with it, I'll put the fake ID in my name. I'll go get the State I.D. [1161] made up, you know, as Chris Hammer but with my face on it. And that way we can just get rid of this stuff and I can drink legally. So we did that, and then I went down and tried to get the title. They couldn't find the year. So I, you know, went back, got the license plate number and I had to go the next day to take and get the, took the license plate number down to the license bureau, and they gave me the title number. I went down and got the title made up, and then we left and sold the car.

DET. LEITER: How did you get over to –

MR. DIXON: The first time we used Tim Hoffner's brother's truck, Dan Hoffner. Dan let Tim

borrow it. I don't know where Dan was at the time, and Dan, you know, he came over now and then but not that much because he really don't like me that well because he says that me and his brother run too much together and he [1162] doesn't see his brother that much. So then – the other time it was from another one of his buddy's name, all I know him by is Mickey.

DET. LEITER: Okay. I want to stop right there just for a moment. After, after you take Chris over to the hole you guys dig –

MR. DIXON: Correct.

DET. LEITER: And you put him in and covered him up, then you did this with Chris's car; is that correct?

MR. DIXON: Correct.

DET. LEITER: Did you and Tim go back to the house together and still have Chris's car?

MR. DIXON: Correct.

DET. LEITER: Back to Kirsten's's house?

MR. DIXON: Correct.

DET. LEITER: Okay. Then at that point, what do you do with the car at that point? Where do you put it?

[1163] MR. DIXON: When we get to the house, we back up close to the house between the rosebush and the house and by the back door so nobody can see it.

DET. LEITER: Who's driving it?

MR. DIXON: Tim is. He goes I want to drive it 'cuz see Chris let me borrow it a couple times –

DET. LEITER: Who drove it over to where you buried –

MR. DIXON: No, Tim drove it.

DET. LEITER: Tim drove?

MR. DIXON: Yes, because Tim had the leather gloves.

DET. LEITER: Okay. How about back?

MR. DIXON: Tim drove back because he stopped at the gas station, and because Tim made the comment well Chris let you drive his car here and there and there and here and I never drove it, so he drove [1164] it. And like I said, and then when we got the title all done, his buddy Mickey drove us over – drove Tim over to the car lot and I drove the car over to the car lot because I had the title and the ID made in my name.

DET. LEITER: Okay. Where did you remove the car to from your house on McGregor?

MR. DIXON: We took it over to apartment building on Alexis Road.

DET. LEITER: When did you do that?

MR. DIXON: It was the very next day. We were up at the Hi-Q Billiards. We parked the car at Andersons, walked over to Hi-Q Billiards, and I had seen Chris's dad come in and through and I told him. Tim go well we got to get rid of the car. So, I drove it down to them apartment buildings.

DET. LEITER: You drove it over to Alexis behind the apartment buildings?

[1165] MR. DIXON: Correct, and I parked it there and I walked back up to Hi-Q.

DET. KULAKOSKI: I have a couple of questions. Did you have to clean the back seat of the car up? Was there any blood back there?

MR. DIXON: No.

DET. KULAKOSKI: You didn't see any blood at all?

MR. DIXON: Didn't see any blood at all.

DET. KULAKOSKI: Okay. When you got back to Kirsten's, after you buried Chris, what about the blood inside the, the house?

MR. DIXON: It was already cleaned up. The blood had already been cleaned up and –

DET. LEITER: Who that cleaned up?

MR. DIXON: Kirsten Wilkerson.

[1166] DET. LEITER: How do you know she cleaned it up?

MR. DIXON: Because she said don't do this shit in my house ever again, and I just kind of looked at her, I said I'm sorry I didn't know it was gonna happen, I thought he was screwing around, and she goes well I don't feel like having to clean up you guys' blood. I shouldn't have had to clean it up, but I got tired of looking at it and smelling it.

DET. LEITER: Okay. So she cleaned, she told you she cleaned up the blood. Where was the blood in the house?

MR. DIXON: It was, as you walk from the kitchen down the hallway and turned right into the front room, it was right there at the bottom of the steps, there was a big puddle of blood.

DET. LEITER: Okay. Now, when you say she cleaned it up and that, did she know what you guys had went and dug the hole?

[1167] MR. DIXON: No. She didn't know we dug the hole.

DET. LEITER: At that time?

MR. DIXON: At the time, until afterwards, she didn't even know – I told her straight out that, yeah, we got rid of the body.

DET. LEITER: When did you tell her this?

MR. DIXON: When we got back 'cuz she asked where Chris was.

DET. LEITER: Was this after you took Chris over there –

MR. DIXON: Correct.

DET. LEITER: And came back with this car, just the two of you?

MR. DIXON: Correct.

DET. LEITER: She asked where Chris was at?

MR. DIXON: Right.

DET. LEITER: And you told what?

MR. DIXON: And I said I got [1168] rid of it, we got rid of him, and so we're sitting there and I went in and laid down on the bed. I tried to sleep a little bit. I couldn't sleep. We got up. That's when

we drove the car up to Andersons and walked over to Hi-Q.

DET. KULAKOSKI: I've got a question for you, Arch?

MR. DIXON: Okay.

DET. KULAKOSKI: When you took the body back over to the grave site, did you park the car still on Alexis Road?

MR. DIXON: No. We parked right out by the pathway.

DET. KULAKOSKI: Is there a road that takes you up that way?

MR. DIXON: Yeah.

DET. KULAKOSKI: Okay.

MR. DIXON: There's like a road that goes in a big U –

DET. KULAKOSKI: Okay.

MR. DIXON: And its, you come down, you can go to the first road [1169] right there after you got off Tallmadge, the first road on the right-hand side, you take that and follow it all the way up and around, and it will come back onto Alexis and, but we stopped. It's like right after a ditch, the pathway is.

DET. KULAKOSKI: Okay. Um, you say there was blood just off of the kitchen in the house, right?

MR. DIXON: It was in the front room.

DET. KULAKOSKI: Okay, in the front room. Was there any blood in the kid's room where he was tied up?

MR. DIXON: I didn't see any blood in there and –

DET. KULAKOSKI: What about in the bathroom?

MR. DIXON: The blood in the bathroom was cleaned up before I could see if there was any because it was all in the sink when he was cleaning himself.

DET. LEITER: You said you [1170] found something in the –

MR. DIXON: Well, on the sheet by the towels that covered over the towels, there was like a curtain over there and a curtain rod. It looked like it was blood, so I had her wash it, and it still stained in there a little bit, so I had her burn it because I didn't know –

DET. KULAKOSKI: Had her burn? I thought you said earlier you –

MR. DIXON: I threw it in the fireplace and burned it. I told her to make sure that it was burnt completely where there was nothing left of it. So she went out in the woods and got some wood and that and burnt it all, burned a fire in there that night. I didn't' know that she had burned a fire in there that night other than, 'cuz I threw a bunch of newspaper and that sheet in there.

DET. KULAKOSKI: Did you light the fire?

MR. DIXON: Yes, I did.

[1171] DET. KULAKOSKI: When the sheet was in there?

MR. DIXON: Correct.

DET. LEITER: Is this a cloth sheet?

MR. DIXON: Yes, and then I left and when I came home later that evening, I said what did you do put wood in there too. She goes, yeah, I just had a big fire in there. She said I had a fire for a couple hours with wood and everything to make sure it was gone.

DET. LEITER: So what did you tell Kirsten later after you came back and told her you got rid of him?

MR. DIXON: Well, I told her I got rid of him, and I didn't really say nothing for a couple days and then I was sitting there and still couldn't sleep, and you know still having problems, and she – which I had problems before sleeping, I was always jumping in my sleep, and I told her what had happened, what we had done with [1172] Chris, and she just look at me like, 'cuz I told her we were going to let him go.

DET. LEITER: When did you tell her that?

MR. DIXON: Before we even took Chris out of the house, I said I'm trying to talk Tim into letting him go. I'm not sure if he's going to go for it or not.

DET. KULAKOSKI: Did you ever go back to the grave site after that day?

MR. DIXON: Yes, I did.

DET. KULAKOSKI: How many times did you go back there?

MR. DIXON; I went back there once after that to see if any dogs or anything had been digging on it, and then I was back in the woods one day, just walking around hunting, before I found out my dad

didn't want me back there with a shotgun, and I was over near there I was maybe 200 yards from there, so I figured I'd walk over there to see what was going on. I walked over that way and looked at it, [1173] everything looked okay, there was no dogs or nothing on it, and I walked back through the woods, went back to my mom and dad's, after I took a little walk up in Michigan just kind of looking around because I had seen a lot of deer tracks and there never been deer really in that woods before.

DET. KULAKOSKI: Anymore questions?

DET. LEITER: Did you have go back to that site with Tim, after, after –

MR. DIXON: Yeah. The one time that I went back there I think it was like the next day, Tim and I both went back there to make sure everything looked, that nothing really looked too abnormal.

DET. KULAKOSKI: Did you ever take Kirsten back over there?

MR. DIXON: Kirsten, no.

DET. KULAKOSKI: To show –

MR. DIXON: No.

DET. KULAKOSKI: Did you take anybody else over and show them that site?

[1174] MR. DIXON: No, I did not, no.

DET. LEITER Okay. Archie, you're making this statement of your own free will?

MR. DIXON: Correct.

DET. LEITER Okay. Anybody threaten you or promised you anything to make these statements?

MR. DIXON: No.

DET. LEITER: These statements one hundred percent the truth?

MR. DIXON: Yes.

DET. LEITER: Anybody make you any deals of any kind?

MR. DIXON: No.

DET. LEITER: To get to you make any statements?

MR. DIXON: No.

DET. LEITER: Okay.

DET. KULAKOSKI: We're going to conclude the interview at this time. The time is 2030 hours.

* * *

# OPPOSITION BRIEF

No. 10-1540

In the

# United States of the Supreme Court

DAVID BOBBY, Warden,
*Petitioner,*

v.

ARCHIE DIXON,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION


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## PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding.

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## STATEMENT OF THE CASE

The sequences of interrogations and court decisions are essential to an understanding and review of the admitted misconduct by the police and the ultimate failure of the Ohio Supreme Court to correct the errors in this case. The police set out to deliberately, intentionally violate Mr. Dixon's Constitutional rights. They conspired to withhold giving the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and the Fifth Amendment. The police deliberately used a two-step interrogation process to break Mr. Dixon's known intent to invoke his right to counsel. The best and most direct statement of the facts comes from the Trial Court Opinion (Apx. 1b-39b) as the Trial Court heard the testimony, made credibility and factual determinations based on hearing and seeing the demeanor of the witness rather than from a cold transcript.[1]

**The Interrogations**

The first interrogation occurred on November 4, 1993. Toledo Detectives Scanlon and Snow interrogated Mr. Dixon. Mr. Dixon was not in custody at this time. However, the detectives advised Mr. Dixon of his rights under *Miranda* and the Fifth Amendment. Apx. 6b (Trial Court Opinion at 6). Mr. Dixon invoked his right to counsel and he told the detectives that he would talk with them after talking with his attorney. The interrogation immediately ceased and Mr. Dixon was allowed to leave the police station.

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[1] The Trial Court opinion is noticeably absent from Petitioner's Petition for Writ of Certiorari.

On November 7 or 8, 1993, Detective Scanlon called Mr. Dixon's attorney and asked about questioning Mr. Dixon. The attorney advised Detective Scanlon that he had not spoken with Mr. Dixon. Detective Scanlon advised Mr. Dixon's attorney that he wanted to talk to Mr. Dixon about the disappearance of the victim. Apx. 7b (Trial Court Opinion at 7).

The second interrogation occurred on November 9, 1993. It is clear that Mr. Dixon was in custody and subject to interrogation and that the police were under the full obligations of *Miranda* and the Fifth Amendment. It was at this point that the Detectives left the path of lawful and Constitutional interrogation and deliberately violated the Constitution.

Detectives Snow and Kulakoski took over the interrogation of Mr. Dixon. Kulakoski was a detective in the Toledo Police Department Homicide Unit. Apx. 1b (Trial Court Opinion at 8). The detectives discussed whether to advise Mr. Dixon of his rights. Detective Snow told Kulakoski that Mr. Dixon could be difficult if given warnings and they agreed not to give warnings out of fear that Mr. Dixon would invoke his rights. Snow specifically decided that warnings should not be given because he knew Mr. Dixon had invoked just five days earlier. Apx. 10b (Trial Court Opinion at 10).

Kulakoski and Snow interrogated Mr. Dixon over the course of four hours (from 11:30 a.m. until 3:30 p.m.) and never once advised him of his rights. Although the Ohio Supreme Court stated that this interrogation lasted only 45 minutes, *State v. Dixon*, 101 Ohio St.3d 328, 331 (2004), there was no explanation offered by the

state about what happened during the other 3 hours and 15 minutes nor did the Trial Court make any finding regarding this issue.

The interrogation continued even after Mr. Dixon told the detectives "I didn't even want to speak with you guys unless I had an attorney present, because ... I have no faith in the system anymore." *Dixon*, 101 Ohio St.3d at 331. The Trial Court specifically found that both detectives knew that Mr. Dixon was referring to his November 4 invocation of his right to counsel. Apx. 12b (Trial Court Opinion at 12). Both detectives simply ignored this statement and continued to interrogate Mr. Dixon. Apx. 13b (Trial Court Opinion at 13).

The focus of the interrogation at that time was on the disappearance of the victim, not on the auto title forgery charge for which Mr. Dixon had been arrested. Apx. 11b (Trial Court Opinion at 11). Mr. Dixon then made incriminating statements. Apx. 11b (Trial Court Opinion at 11). After receiving statements implicating Mr. Dixon in the theft of the victim's car and the forgery of the auto title, the detectives turned directly to the disappearance of the victim. Apx. 11b (Trial Court Opinion at 11). It is clear that the homicide detectives were investigating a murder not a simple auto theft or forgery. Apx. 9b (Trial Court Opinion at 9).

During this interview Kulakoski promised benefits to Mr. Dixon if he made statements regarding the disappearance of the victim. Apx. 13b (Trial Court Opinion at 13). Kulakoski told Mr. Dixon:

> Arch, there's one thing I want to stress with you. If something happened to Chris and you had any involvement, even though it may not have been a major role in what happened to Chris, you had any involvement now is the time to say so because if Tim starts cutting a deal over there, this is kinda like a bus leaving. The first one that gets on it is the only one that's gonna get on. I'm just letting you know right now.

Apx. 13b (Trial Court Opinion at 13). Shortly after this the detectives returned Mr. Dixon to jail, booked him on the forgery charge and returned him to his cell.

The third interrogation occurred on November 9, 1993 from 7:30 to 8:00 p.m. Detectives Kulakoski and Leiter conducted the interrogation. Leiter, like Kulakoski, was a detective in the Toledo Police Department Homicide Unit. Apx. 8b (Trial Court Opinion at 8). At this time *Miranda* warnings were given. Although a tape recorder was on the table it was not turned on because "we had no idea what he was going to say until we talked to him." Apx. 40b (Testimony of Detective Leiter). Mr. Dixon again made incriminating statements.

The fourth interrogation occurred on November 9, 1993 starting at 8:00 p.m. Detectives Kulakoski and Leiter conducted this interrogation. At this point the tape recorder was turned on and *Miranda* warnings were given. There was no statement that the prior, unconstitutional statement could and would not be used in court. Rather Leiter began the interrogation specifically invoking the prior statements. "Leiter: We talked a little bit ago. Dixon: Yes. Leiter: And you gave us a statement. Is that correct. Dixon: Yes. Leiter: Everything you told us then the truth. Dixon:

Yes." Pet. Apx. 192-193 (Transcript of Taped Statement of Archie Dixon, Apx. 1609). Mr. Dixon then made further incriminating statements.

B. Procedural History

Once it was revealed that the detectives deliberately and intentionally violated Mr. Dixon's rights the trial court suppressed all statements. Apx. 1b-39b (Trial Court opinion at 1-39.) In a remarkably prescient opinion the Trial Court specifically rejected the state's arguments that *Oregon v. Elstad*, 470 U.S. 298 (1985), authorized the interrogation strategy used by the police. Apx. 30b-37b. (Trial Court opinion at 30-37). In so holding the Trial Court specifically found that "the decision of Kulakoski and Snow to dispense with *Miranda* warnings was deliberate and tactical. They did so because they feared the warnings would prompt Dixon to refuse to talk and invoke his right to counsel. In making this deliberate and tactical decision, one of the detectives (i.e., Snow), had very recently seen Dixon refuse to talk; and, that same officer not only knew Dixon had a lawyer, he knew the lawyer's name. Moreover, it is beyond cavil that both Kulakoski and Snow knew Dixon was in custody and under arrest, as they had helped serve the arrest warrant earlier that morning. Thus, this Court finds the actions of Kulakoski and Snow (in deliberately failing to administer the *Miranda* warnings prior to the midday interrogation) were tactical and willful. This court also finds those actions to have been egregious, and a gross departure from accepted police procedure. Their actions worked to render the *Miranda* protections a nullity." Apx. 32b-33b (Trial Court opinion at 32-33) (emphasis in original).

The state sought an interlocutory appeal to court of appeals. On appeal the court of appeals reversed the suppression. In so doing the court of appeals unreasonably determined that "We do not believe that the effect of this particular misconduct, absent other evidence of coercive activity on the part of the police reaches so far as to taint the later Mirandized statements of Dixon." *State v. Dixon*, 101 Ohio App. 3d 552, 558 (Sixth Dist. 1995). The court of appeals then proceeded to evaluate the voluntariness of the fourth interrogation without any consideration of the totality of interrogations. *Id.*

The Supreme Court of Ohio denied Mr. Dixon's petition for discretionary review. *State v. Dixon*, 73 Ohio St.3d 1410 (1995).

The matter returned to the trial court where a different trial judge presided over the trial. The state used Mr. Dixon's statements as the primary evidence against him at both trial and sentencing. The jury convicted Mr. Dixon and recommended a death sentence. The trial court accepted that recommendation.

On appeal the court of appeals refused to address this issue. *State v. Dixon*, 2000 Ohio App. Lexis 5310, 17 (Sixth Dist. 2000).

The Ohio Supreme Court considered this issue on Mr. Dixon's appeal of right. The Ohio Supreme Court affirmed the use of Mr. Dixon's statement on the basis of *Oregon v. Elstad*. *State v. Dixon*, 101 Ohio St.3d 328 (2004). In so doing the Ohio Supreme Court relied on the absence of physical or verbal abuse and the fact that Mr. Dixon failed to prove how the intentional violation was greater coercion than an

inadvertent *Miranda* violation. *Id.*, at 332, failing to recognize the perverse disregard of the Constitution that the trial judge noted.

The Ohio Supreme Court found, contrary to the factual finding by the Trial Court, that Kulakoski's statement about only one suspect "getting on the bus" was not a promise of possible benefits but rather "akin to an admonition to tell the truth." *Id.*, at 333.

Finally the Ohio Supreme Court found no "nexus" between the clearly unconstitutional interrogation and the final interrogation because Mr. Dixon did not confess to the murder. *Id.*, at 333. The Court ignored the fact that Mr. Dixon clearly made a confession to stealing the victim's car, and selling it through forged documents. This confession is a confession to the murder and more importantly capital murder as it directly connects Mr. Dixon to the victim, puts him possession of his property, and was a confession to the aggravating circumstance of robbery.

Mr. Dixon presented this issue to this Court in a petition for a writ of certiorari. This Court denied Mr. Dixon's petition. *Dixon v. Ohio*, 543 U.S. 1060 (2005).

## REASONS FOR DENYING THE WRIT

### A. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to the *Miranda* violation.

Petitioner's characterization of the Sixth Circuit's decision bears no relationship to the actual decision. The Sixth Circuit's decision making process fully comports with established *habeas* law and AEDPA and there is no conflict among the circuits applying such well-established principles. The Sixth Circuit properly reviewed this case under clearly established Constitutional law, *Miranda v. Arizona*, and determined that the Ohio Supreme Court's decision was an unreasonable application of *Miranda* and was predicated on an unreasonable determination of facts. *Dixon v. Houk*, 627 F.3d 553, 556, 558 (6th Cir. 2010).[2]

First, contrary to Petitioner's misrepresentation, the Sixth Circuit did not reverse this case based on *Edwards v. Arizona*, 451 U.S. 477 (1981). Rather, as the Sixth Circuit's opinion clearly states: reversal was mandated by *Miranda*. *Dixon*, 627 F.3d at 555, 558. In fact, the only citation to *Edwards* occurs after a quotation from *Miranda* as an "e.g." citation. *Dixon*, 627 F.3d at 557. The Sixth Circuit opinion is based upon fundamental principles of *Miranda*.

The Sixth Circuit clearly and directly reviewed both the Trial Court decision and the Ohio Supreme Court decision. Ohio's misuse of *Elstad* was the same as Missouri's in *Seibert* leading the Court to declare that the decision "disfigures that

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[2] As Petitioner is fully aware, the Sixth Circuit's order granting *en banc* review was vacated when Mr. Dixon advised the Court that a circuit judge had improperly voted on the petition for *en banc* review.

case." *Seibert*, 542 U.S. at 614. Whatever "unreasonable application" means, it must encompass an application that "disfigures" Supreme Court precedent. The Sixth Circuit properly reviewed this case and ordered the Writ.

Second, the Sixth properly considered the deliberate nature of the police misconduct. In fact, contrary to Petitioner's assertions, the Circuits are uniform in this consideration. Intentional violations of *Miranda* distinguish the case from *Elstad*. *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004); *United States v. Carter*, 489 F.3d 528, 535 (2nd Cir. 2007); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005). Petitioner's attempt to fabricate a circuit split instead shows the unreasonableness of the Ohio Supreme Court decision. Every court considers whether the violation of *Miranda* was deliberate or not. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). Since Petitioner accepts that *Seibert* is available to give context to *Miranda* and *Elstad*, the Circuit was correct to consider the deliberate nature of the violation in its review. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

*Elstad* involved an "oversight" in the application of *Miranda* to a situation that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation'." *Siebert*, 542 U.S. at 614, quoting *Elstad*, 470 U.S. at 315-16. *Elstad* itself limited its reach to "arguably innocent neglect of *Miranda*." *Siebert*, 542 U.S. at 615, quoting *Elstad*, 470 U.S. at 311-14. See *Elstad*, 470 U.S. at 314 ("We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement...") *Elstad* specifically rejected Justice

Brennan's concern that police would adopt a "question first" policy as distorting the "reasoning and holding of our decision." *Elstad*, 542 U.S. at 318, n. 5. "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* [*v. United States*, 530 U.S. 428 (2000),] held Congress could not do by statute." *Seibert*, 542 U.S. at 617. Kulakoski and Snow epitomize a dedication to draining the substance out of *Miranda*.

*Miranda* "encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rationale choice." *Miranda*, 384 U.S. at 464-465. Here the police deliberately withheld giving warnings because they knew Mr. Dixon would invoke his right to counsel. The police knew he had a lawyer and knew who that lawyer was. The police ignored Mr. Dixon's clear statement that he had already requested a lawyer and pressed forward with the interrogation. Only after getting incriminating statements from Mr. Dixon did the police turn on the tape recorder and give basic *Miranda* warnings. There was no effort to explain to Mr. Dixon that his earlier statements could not be used against him. As the Trial Court found, the police "actions worked to render the *Miranda* protections a nullity." Apx. 33b (Trial Court Opinion at 33).

Petitioner's repeated assertions that Mr. Dixon did not make incriminating statements during the first November 9 interrogation were determined to be "disingenuous" by the Trial Court. Apx. 11b (Trial Court Opinion at 11). It is only by making this assertion that Petitioner attempts to create an issue. Of course

Petitioner ignores the reality of the interrogations. Mr. Dixon gave confessions to the theft of the victim's car, forgery of the title documents, and other property crimes involving the victim. The homicide detectives conducting the interrogation got a confession beyond those charges because Mr. Dixon's confession was a confession to the murder and more importantly capital murder as it directly connects Mr. Dixon to the victim, puts him possession of his property, and was a confession to the aggravating circumstance of robbery. "When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the *substance* of prewarning statements must be excluded absent specific, curative steps." *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring) (emphasis added). This Court has never imposed an issue specific limitation on *Miranda*. *Miranda* covers all aspects of any interrogation regardless of the specific topic. *Colorado v. Spring*, 479 U.S. 564 (1987). The homicide detectives in this case went after, and got, a confession in clear, deliberate, and direct violation of *Miranda*.

Third, the Sixth Circuit properly evaluated the totality of the circumstances and the state court opinions in deciding that Mr. Dixon's statement was involuntary. The state trial court, the court that heard the live evidence, observed the witnesses, and made credibility determinations, found that "Kulakoski's employment of his self-designed, factually and legally erroneous bus analogy; the scant record of the interrogation; and the State's failure to demonstrate that Dixon's knowledge of the criminal justice system enabled him to independently ascertain

his rights and the true consequences of 'getting on the bus'; the Court finds that the statements made by Dixon during the midday November 9th interrogation were involuntarily made." Apx. 37b-38b (Trial Court Opinion at 37-38). Without any explanation the Ohio Supreme Court determined that this "analogy is more akin to an admonition to tell the truth than a promise of possible benefits." *State v. Dixon*, 101 Ohio St.3d at 333. This is patently unreasonable and ignores the facts: Timothy Hoffner, the one who decided to kill the victim and involved Mr. Dixon in his scheme, had been arrested, confessed to the crime, led the police to the body, and was released by the police. Apx. 14b (Trial Court Opinion at 14). The police told Mr. Dixon of these facts. Snow testified that "Kulakoski's statement was aimed at encouraging Dixon to talk about Hammer's disappearance." Apx. 13b (Trial Court Opinion at 13). The only meaning that can be derived from Kulakoski's statement is that the first one to confess will not get the electric chair. There can be no more inherently coercive tactic than "confess or die."

Finally, the Sixth Circuit recognized that the Ohio Supreme Court improperly imposed the burden on Mr. Dixon to prove that his confession was coerced rather than placing the burden on the state. "Dixon has failed to explain how the detective's subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent." *Dixon*, 101 Ohio St.3d at 332. This was the only mention of the burden of proof. Since the burden squarely lies on the government to prove voluntariness, *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), the shifting of the burden is clearly contrary to and/or an unreasonable application

of clearly established law. The Ohio Supreme Court denied relief not because it determine that the state proved voluntariness but because Mr. Dixon failed to prove coercion.

It is clear when reviewing the case in total, including the Trial Court opinion and record, that the Sixth Circuit broke no new ground or breached the clear mandates of the law. As such the Petition for Writ of Certiorari must be denied.

One final issue raised in a cursory fashion by Petitioner is the limitation on the use of *Missouri v. Seibert*, 542 U.S. 600 (2004). As the Sixth Circuit noted in both the majority and dissenting opinion, *Seibert* is useful in evaluating the context of *Miranda* and *Elstad*. *Dixon*, 627 F.3d at 569 (Siler, J., dissenting). As such, the use of *Seibert* is entirely consistent with the AEDPA. Petitioner agrees with this position. Petition at 19, n. 5.

In a related context interpreting the phrase "clearly established law" the Court held that "[T]o be established clearly, however, there is no need that 'the very action in question [have] previously been held unlawful.'" *Safford Unified School District #1 v. Redding*, 129 S.Ct. 2633, 2643 (2009) quoting *Wilson v. Lane*, 526 U.S. 603, 615 (1999) (addressing the question of qualified immunity of state actors). Rather, the issue is whether the Court's statements were sufficiently clear to put officials on notice. *Hope v. Pelzer*, 536 U.S. 730, 41 (2002). Even the fact that there are "disuniform views of the law" does not render the law unclear. *Redding*, 129 S.Ct. at 2644. The development of the law is clear: intentional violations of *Miranda*

and the Fifth Amendment rights of a defendant mandate suppression of any statements obtained. See *Arizona v. Fulminante*, 499 U.S. 279 (1991).

Although not necessary to reject the Petition, Mr. Dixon also asserts that the restricted level of review imposed by the AEDPA does not apply to this claim. The Ohio Supreme Court reviewed and rejected Mr. Dixon's claim on April 14, 2004. *State v. Dixon*, 101 Ohio St.3d 328 (2004). However, Mr. Dixon's direct appeal of right was not complete until the Supreme Court of the United States denied his petition for a writ of certiorari on January 10, 2005. *Dixon v. Ohio*, 543 U.S. 1060 (2005). Therefore, cases applicable to Dixon's case are those decided by the Supreme Court of the United States by January 10, 2005. *Missouri v. Seibert*, 542 U.S. 600 (2004), was decided on June 28, 2004 and is therefore controlling authority and applicable to this issue. *Teague v. Lane*, 489 U.S. 288 (1989).

The Court recently agreed to review this issue. *Greene v. Fisher*, 131 S.Ct. 1813 (2011). The Court previously determined that the controlling law under AEDPA is determined by *Teague*. *Williams v. Taylor*, 529 U.S. 362, 429-30 (2000) (O'Connor, J., majority opinion).

> Throughout this discussion the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta of this Court's decisions as of the time of the relevant state-court decision. In this respect "clearly established Federal law" phrase bears only a slight connection to our *Teague* jurisprudence. With one caveat, whatever would qualify as an old rule under *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1).

Because *Seibert* is controlling authority, and the Supreme Court of Ohio did not, and could not, apply *Seibert* there was no "decision on the merits" of this claim. Therefore, Mr. Dixon is entitled to *de novo* review. *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003); *Webb v. Mitchell*, 586 F.3d 383, 389, 393 (6th Cir. 2009) (Warden conceded that AEDPA did not apply and that *de novo* review was proper). *Harris v. Stovall*, 212 F.3d. 940, 942 (6th Cir. 2000); *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir. 2004); *Higgins v. Renico*, 470 F.3d 624, 631 (6th Cir. 2006). See also *Williams v. Taylor*, 529 U.S. 420 (2000).

The Ohio Supreme Court was apprised of *Seibert* and the application to Mr. Dixon's case. The Supreme Court of Ohio issued its opinion aware that *Seibert* was pending with a similar question posed by Dixon's case. The state court was given the opportunity to address the impact of *Seibert* on Dixon's case but chose not to. No issue of comity, federalism, or AEDPA policy rationale, requires the federal courts to ignore binding, applicable law that the state courts chose to ignore. A claim is fairly presented if the state courts were given sufficient notice of the nature of the federal claim. *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). Even if the legal predicate is expanded the claim is still fairly presented so long as the underlying ground for the claim remains unchanged. The scope of the ground is to be liberally interpreted. "By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged

psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations." *Sanders v. United States*, 373 U.S. 1, 16 (1963). See also *Vasquez* v. *Hillery*, 474 U.S. 254, 258 (1986); *Boumediene* v. *Bush*, 128 S.Ct. 2229, 2270 (2008); *Lonchar* v. *Thomas*, 517 U.S. 314, 327 (1996); *Schlup* v. *Delo*, 513 U.S. 298, 308-10 & n.18 (1995); *Herrera*, 506 U.S. at 445 (Blackmun, J., dissenting on other grounds); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting).

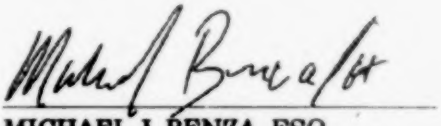
> The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, **unavailing.** If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

*Hamdi v. Rumsfeld*, 542 U.S. 507, 574 (2004) (Scalia, J., dissenting). This is especially so when the evidence before the state courts clearly demonstrated the scope, intentionality, and impact of the blatant Constitutional violation in this case. Given the beleaguered history of AEDPA, "All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), if AEDPA prevents federal review and relief in this matter then it suspends the Writ.

## CONCLUSION

Homicide detectives Kulakoski and Snow set out to intentionally, deliberately, and blatantly violate Mr. Dixon's Constitutional rights. They conspired and agreed to interrogate Mr. Dixon without giving him the warnings required under *Miranda* because they knew if they did he would invoke his right to counsel. After multiple hours of interrogation Mr. Dixon made statements incriminating him in the death of the victim. Only then did the detectives give cursory lip service to the Constitution and give basic *Miranda* warnings. For the above stated reasons, Mr. Dixon requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Sixth Circuit's decision and opinions. The Sixth Circuit's decisions create no conflict of law, nor will it create any sort of confusion in this Court's jurisprudence. Petitioner does not provide any other reason to warrant revisiting these well and clearly-established areas of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,



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July 21, 2011

# APPENDIX

FILED LUCAS CO

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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

State of Ohio, *

Plaintiff, * Case No. CR93-7212B

vs. * OPINION AND JOURNAL ENTRY

Archie J. Dixon, *

Defendant. *

*

This cause is before the Court on the motion to suppress certain statements made by defendant Archie J. Dixon ("Dixon") to law enforcement officers during two custodial interrogations following his arrest November 9, 1993, on a forgery charge. These statements, Dixon alleges, led to his indictment for aggravated murder with felony murder specifications. Hearing was held on the motion to suppress on March 18, 1994, on March 23, 1994, and on March 30, 1994, following which the Court granted leave to the state and the defendant to file post-hearing briefs, and the matter was taken under advisement. In view of the evidence adduced at trial, the memoranda of counsel, and the applicable law, this Court grants Dixon's motion to suppress both statements made to law



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enforcement officials at police headquarters on November 9, 1993.

I.

It is possible to recite the facts bearing directly on Dixon's two statements of November 9, 1993 briefly. A more detailed recitation is given here, however, because of the Court's view that understanding of the earlier events is necessary to place those statements in proper context. That recitation follows.

This case arises from an investigation of the disappearance of Christopher Hammer ("Hammer"). That investigation took place in late September, October, and early November 1993, and culminated in the discovery of Hammer's body in a homemade grave in a remote wooded sector of Sylvania Township, Lucas County, Ohio. That investigation also produced the indictments of Dixon, Timothy Hoffner ("Hoffner"), and Kirsten Wilkerson ("Wilkerson") for aggravated murder, kidnapping, aggravated robbery, and forgery - Dixon and Hoffner being charged with aggravated murder in the tripartite alternative, each with capital specifications for (a) prior calculation and design; (b) felony-murder/kidnapping; and (c) felony-murder/aggravated robbery.

On the evening of September 23, 1993, Mrs. Barbara Hammer contacted the Toledo Police Department to report the disappearance of her 22-year-old son, Christopher. She noted that he had failed to show up for work the previous evening at Nick & Jimmy's, a restaurant-tavern in west Toledo. She stressed that Christopher





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was very conscientious about his job and she was fearful that something had happened because he missed work, and because he had not contacted his parents in the interim. At the time of his disappearance, Hammer was living at 3624 McGregor Lane, Toledo, a single-family residence he shared with Dixon, Hoffner, Wilkerson (Dixon's erstwhile girlfriend), and Wilkerson's minor children.

There were few developments for several weeks after the missing persons report was first made. Detective Ron Scanlon ("Scanlon") assumed control of the investigation for the Toledo Police Department, Youth Services Section, and he conducted a number of other interviews during this period in person and by phone, all the while maintaining contact with Mrs. Hammer. He also talked to a number of Hammer's associates and acquaintances (including Dixon, Hoffner, and Wilkerson). None of these individuals expressed any notion of where Hammer might have gone; none had seen him since he failed to show up for work on September 21, 1993; although several (including Dixon) noted that Hammer had talked previously, if vaguely, about leaving Toledo for Colorado or Tennessee.

Almost exactly a month after Hammer's disappearance two friends of his (John Carmen and James Felt) spotted what appeared to be Hammer's red 1987 Dodge Daytona automobile on the lot of the Central Auto Mart, marked for sale for $5,190. That lot was located at 6200 W. Central Avenue, in Sylvania Township, in western Lucas County. It was, and is, a small operation dealing exclusively in used cars.



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One of these young men passed this information on to Mrs. Hammer, who, in turn, relayed it to Scanlon on October 25, 1993. On October 28, 1993, Mr. and Mrs. Hammer went to the Central Auto Mart and confirmed that the vehicle was their son's, titled in his name and under his control just prior to his disappearance. They inquired as to when and how the car had been acquired by the dealer. Ronald Parker ("Parker"), the manager of the Central Auto Mart, indicated that, on September 30, 1993, he had purchased the vehicle for $2,800 from a young man who had identification and a duplicate auto title in the name of Christopher Hammer. Mrs. Hammer showed Parker a picture of her son, and he indicated this was not the individual who sold him the car the previous month. That same day, Mrs. Hammer called the Auto Title Bureau, and they compared the "Christopher Hammer" signatures on the title and the application for duplicate title. A clerk at the bureau indicated that the signatures appeared to be "different."

All of this information was relayed to Scanlon by Mrs. Hammer in a phone call on October 29, 1993. Scanlon stopped by the Central Auto Mart that same day and talked to Parker. Scanlon confirmed that the individual who sold the car to the dealer had papers indicating he was Christopher Hammer. Parker told Scanlon that he gave the individual a business check for $2800 on September 30, 1993, and that the check had been negotiated the same day at Fifth Third Bank in Sylvania. Parker also told Scanlon that the individual selling the car left the lot in another car with two individuals he could not identify.





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Scanlon returned to Central Auto Mart on November 4, 1993. He spoke again to Parker, but also to Central Auto Mart salesmen Mark Pangman and Henry Strong. Scanlon also got a description from Parker of the individual who had sold them the car on September 30, 1993. While talking to salesmen Pangman and Strong - and out of the presence of Parker - Scanlon inadvertently displayed a photograph of defendant Dixon in such a manner that it was seen by both men. They immediately said that this was the very individual who had sold them the car on September 30, 1993 (both Pangman and Strong were present on September 30 at the lot, and both saw the seller for a brief period; the actual transaction, however, took place over about 30 minutes, and the face-to-face dealing and test driving was done by Parker). This occurred during the late morning hours of November 4, 1993, and gave Scanlon a curious, even accidental identification of Dixon as the seller of the car from the two salesmen; and, Parker described an individual who matched Dixon's description.

Upon leaving the dealership, Scanlon went directly to 3624 McGregor Lane. He did not confront or brace Dixon at the residence, though he did talk to him briefly through the door. Dixon essentially repeated his earlier comments that he did not know Hammer's whereabouts.

Sometime around 1:00 p.m. on November 4, 1993, Scanlon went to the Sylvania Township Police Department and spoke to Detective Vern Snow ("Snow") in Snow's office. Remarkably, while the two detectives were talking, they heard a voice at the front desk say,





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"I'm Archie Dixon, and I'm here to pick up my car." As it happened, Dixon's car had been impounded by the Sylvania Township Police for reasons having nothing to do with this case; thus, the second contact between Scanlon and Dixon on November 4, 1993, was entirely coincidental.

Regardless, Scanlon invited Dixon back to Snow's office, where he told him, "You know, we're investigating the disappearance of Chris Hammer, and we'd like to ask you some questions," or words to that effect. Then, in Snow's presence, Scanlon read Dixon his Miranda rights (this is ironic in light of the later developments in this case, since the November 4th Mirandizing was gratuitous: i.e., Dixon was not in custody, and not under arrest). Dixon declined to answer questions without counsel present, explaining that he had recently completed a six month sentence at the Correctional Center of Northwest Ohio for a misdemeanor offense which he did not commit. He added that he had spoken to police without counsel in that case, and didn't want to make the same mistake. Dixon then departed Sylvania Township headquarters without answering questions. He did provide Scanlon and Snow, however, with the name of his lawyer (Joe Scalzo), and he tentatively agreed to stop down at Toledo Police Headquarters (aka the Safety Building) the following day to discuss the Hammer disappearance.

As it developed, Dixon did not appear at the Safety Building on November 5, 1993. Several days later (on either November 7, 1993 or November 8, 1993), Scanlon made telephonic contact with



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attorney Scalzo ("Scalzo"), and advised him that Dixon had missed an appointment on November 5, 1993. Scalzo indicated to Scanlon that he had not been in touch with Dixon, and that Dixon was sometimes difficult to contact. Scalzo said he would try and reach Dixon, and would see what he could do about arranging an interview. He did not give Scanlon permission to speak with Dixon, however, outside Scalzo's presence. Scanlon informed Scalzo generally about the nature of the investigation into Hammer's disappearance, and it was clear to Scanlon that this was the first Scalzo had heard about the case.

On November 8, 1993, Scanlon returned to the Central Auto Mart with a photo array packet of eight pictures (this array included the very picture salesmen Fangman and Strong had been inadvertantly shown on November 4, 1993, resulting in their assertions that "this" was the individual who had sold the dealership the red 1987 Dodge Daytona). Strong and Parker both separately chose Dixon's photograph, identifying him as the one who sold them the car. Parenthetically, it is noted that the Court previously suppressed the Strong identification of November 8, 1993 as being unduly suggestive; the Parker photo array, however, was deemed proper, and the motion to suppress was denied as to him. Parker testified at hearing that the only photo he ever saw prior to the photo array was the photo the Hammers had of their son. Further, Scanlon testified that he never showed Parker a photo until the November 8th array, and that Parker was not present during the Strong array on November 8th.





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Thus, by the evening of November 8, 1993, the police had located the Hammer car and confirmed its sale on September 10, 1993. They knew that someone other than Hammer had sold the car and had signed the title transfer and odometer certification as if they were Christopher Hammer. They had copies of these documents, and they had a copy of the cancelled Central Auto Mart check for $2,800, endorsed by someone other than Christopher Hammer as Christopher Hammer. Plus, as of November 8, 1993, they also had specific identifications of Dixon as the prime actor in the vehicle transaction.

Early on the morning of November 9, 1993, armed with all of this information, Snow secured an arrest warrant for Dixon charging Forgery, and Scanlon secured a search warrant for the premises at 3624 McGregor Lane. These warrants were served by a number of law enforcement officers. This group included Scanlon and Snow, of the Toledo Police Department ("TPD") and the Sylvania Township Police Department ("STPD"), respectively, as well as the following: Captain Ray Carroll, head of TPD's Crimes Against Persons Section (which includes the Homicide Unit); Lieutenant Charles Hunt ("Hunt") of TPD's Crimes Against Persons Section; Detective Larry Scoble of TPD's Youth Services Section, Missing Persons (the same unit as Scanlon); Detective Chad Culpert of TPD's Scientific Investigation Unit; Detective Dan Deeter of TPD's Scientific Investigation Unit; Sergeant Robert Maxwell, head of TPD's Homicide Unit; and Detectives Philip Kulakoski ("Kulakoski") and Robert Leiter ("Leiter"), both of TPD's Homicide Unit. Also assisting



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were uniformed officers Cherrie Bryce and Gary Bowsher, both of whom testified at the motion to suppress hearing.

At the risk of understatement, it is unusual for the head of the Homicide Unit, two of his detectives, and two command officers from the Crimes Against Persons Section to be actively involved in serving a Forgery arrest warrant. Yet that is precisely what happened during the mid-morning hours of November 9, 1993 at 3624 McGregor Lane. Nonetheless, both Leiter and Kulakoski (as well as Scanlon) testified that - as of November 9, 1993 when the warrant was served - they had no evidentiary basis for suspecting foul play in the disappearance of Hammer.

On the morning of November 9th, the participants in the upcoming arrest/search at 3624 McGregor Lane met at an outdoor location near the residence in question and reviewed positioning and strategy for serving the warrants. The warrants were then served when Kirsten Wilkerson opened the door and permitted the officers to enter the premises. As it happened, Wilkerson, Dixon and Hoffner were all present at that time. These individuals were separated within the residence, and a search of the premises and curtilage began. As is relevant to this particular motion to suppress, it is stressed that Dixon was in the hallway upon entry and was immediately and unequivocally placed under arrest for Forgery by Scanlon. It is also clear that, at the time of the arrest, Dixon was <u>not Mirandized</u>. Shortly thereafter - and before the search was completed - Dixon was taken downtown to the police headquarters where, while under arrest and in custody, he was





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questioned by Kulakoski and Snow.

This initial, unwarned custodial interrogation of Dixon took place over an approximate four-hour period from 11:30 a.m. to 3:30 p.m. It was conducted mainly by Kulakoski, though Snow was present throughout. There were a number of breaks taken in the questioning; Dixon was given soft drinks, was offered food, and was given the opportunity to use rest room facilities during the questioning. The questioning was taped, though it yielded but an eighteen-page transcript; obviously, then, there were frequent breaks.

Prior to beginning the interrogation, Kulakoski and Snow spoke out of Dixon's presence. During that preliminary discussion, Snow indicated to Kulakoski that the STPD had had some prior contacts with Dixon; that Dixon was flighty or high strung; and that Mirandizing him at this time might cause him not to talk to the two detectives. Both Snow and Kulakoski assert that Snow did not tell Kulakoski that Dixon had asserted his right to counsel in response to Miranda warnings only five days previously at Sylvania Township headquarters, and that he had done so in Snow's presence. But it is clear that Snow recalled the incident; indeed, it is clear Dixon's earlier invocation at his right to counsel was Snow's reason for suggesting the Miranda rights/warnings be foregone. [March 18, 1993 hearing transcript ("TR") 239-41]. Snow was present throughout the interrogation although Kulakoski took a much more active role.

The joint decision of Kulakoski and Snow to dispense with





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Miranda warnings for Dixon, notwithstanding his arrest and the fact he was in custody, was deliberate and strategic:

> "Prior to starting of the interview Detective Snow and I had discussed it. Detective Snow had given me information that Mr. Dixon at times could be a difficult party to talk to, to get to say anything at all, and it was decided between the two of us that if he was Mirandized first he may not talk to us at all." [TR 116-7). (Emphasis supplied).

Kulakoski conceded at hearing that this conscious choice not to Mirandize Dixon violated the policies of the Toledo Police Detective Bureau (TR 134-5). Snow attempted to justify this remarkable and inexcusable decision by testifying that the real focus of the questioning was not the forgeries for which Dixon was arrested, but the disappearance of Hammer. (TR 238-9).

A review of the entire transcript of the initial November 9th Dixon statement ("Tr.#1"), discloses that the focus of the interrogation was the disappearance of Chris Hammer, and not the auto title forgery for which Dixon had been arrested minutes before at 3624 McGregor Lane by a phalanx of officers. Yet, it is clear that questions were asked relative to the disposition of the Dodge Daytona (Tr.#1, 7 and 10-12). And - contrary to the disingenuous suggestion in the State's memorandum of May 2, 1994 that this initial statement did not produce incriminating statements from Dixon - the defendant admitted selling the car by means of a false State I.D. card and a false duplicate title, and he told of receiving the proceeds. (Tr. #1, 10-12).



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In that interrogation, Kulakoski soon returned to the Hammer disappearance. Kulakoski said, "* * * So I think something else happened to him". Dixon responded:

> "This is understandable, but everything I know I've already told you. I've been more than welcome to tell you. I mean usually, like I told you, you can ask this gentlemen right here cause (inaudible), I didn't even want to speak with you guys unless I had an attorney present because that eight months I did I talked to an attorney; told my side, I spent eight months for something I never did so I had no faith in the system anymore. But yet I still, like just now told you everything I know, admitted to the forgery and yet still * * * ." (See transcript of the first November 9th interrogation (Tr. #1) 15 and TR 137-8).

Shortly after this exchange, Kulakoski directly asked Dixon, "Did you have anything to do with the anything that might have happened to Chris?" Dixon then responded, "I don't know anything." (Id.)

In reference to Dixon's above comment, "...you can ask this gentlemen right here * * *," both Kulakoski (TR 137-8) and Snow (TR 242) admit that Dixon was referring to his November 4th assertion of his right to counsel when Mirandized at Sylvania Township headquarters by Scanlon. Even though Dixon had made this comment, Kulakoski neither stopped the interrogation to ask Snow what Dixon meant by his reference to Snow, nor did he attempt to clarify whether Dixon did, in fact, wish to have counsel present before continuing with the interview. Nor, perhaps more to the point, did Snow interrupt at this point with a reference to or description of



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the November 4, 1993 incident. And, of course, Snow had personal knowledge of the earlier invocation of Dixon's right to counsel, knew counsel's name, and knew precisely to what Dixon made reference in his answer above.

Finally, near the end of the first interview on November 9th, Kulakoski made the following statement to Dixon:

> "Arch, there's one thing I want to stress with you. If something happened to Chris and you had any involvement, even though it may not have been a major role in what happened to Chris, you had any involvement now is the time to say so because if Tim starts cutting a deal over there, this is kinda like a bus leaving. The first one that gets on it is the only one that's gonna get on. I'm just letting you know right now." (Tr #1, 16).

When questioned about this statement, Snow testified that Kulakoski's statement was aimed at encouraging Dixon to talk about Hammer's disappearance. (TR 245). Snow also indicated that the statement could be perceived as a promise of possible benefits if Dixon revealed information regarding Hammer's disappearance. (TR 245-6).

After they wound up the interrogation process with Dixon at the Safety Building around 3:30 p.m., Kulakoski and Snow escorted Dixon to the Lucas County Correction Center, where he was booked on the Forgery offense. Shortly thereafter, Kulakoski was advised by someone that Hammer's body had been discovered in a jerry-dug grave in a wooded area off Alexis Road in Sylvania Township. Kulakoski visited the scene of the excavated grave briefly and then returned



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to the Safety Building, where Leiter was questioning Timothy Hoffner. Hoffner had led Leiter and Hunt to that site earlier in the afternoon, explaining that Dixon had told Hoffner several days after Hammer's disappearance that he (Dixon) had "put Chris in a hole." Hoffner told Leiter and Hunt that Dixon had then showed him where Hammer was buried. It is clear at this juncture, by the way, that Hoffner was not under arrest, nor was he in custody. Hoffner was taken to police headquarters after the body was unearthed, where at 3:30 p.m., he was interviewed (on tape) by Leiter and Scanlon.

Kulakoski and Leiter then drove Hoffner back to 3624 McGregor Lane and dropped him off. It was then close to 6:00 p.m. Hoffner indicated that he was going to gather his belongings and drive to Perrysburg, Ohio to stay with his mother. While at the McGregor Road residence, Leiter and Kulakoski spoke briefly to Wilkerson. The two homicide detectives then returned to the Safety Building, where they decided to interrogate Dixon a second time. At about 7:30 p.m., or four hours after the conclusion of the first interrogation, Dixon was brought to police headquarters at the instance of Kulakoski and Leiter. This reunion marked the second interrogation on November 9th, and it represents the central target of defendant's motion to suppress.

There is a transcript of this second interrogation of Dixon on November 9, 1993 ("Tr.#2). Kulakoski and Leiter were the officers present during the questioning. The taped statement commenced at 8:00 p.m., although Dixon arrived at the Homicide Unit at about



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7:30 p.m. This half-hour period preceding transcription began with Dixon stating to the officers, "I understand you dug up a body this afternoon," or words to that effect. It is, of course, intriguing as to how Dixon would have come by this information since he was lodged at the Lucas County Jail prior to Kulakoski's learning of the gravesite discovery, and there is no indication he spoke with anyone connected to this case between 3:30 and 7:30 p.m. Regardless, the detectives confirmed that a body had been unearthed. Further, during this period, Dixon inquired of the detectives as to whether Hoffner was in custody, and the detectives replied "no", and that, in fact, they had only recently dropped him off at 3624 McGregor Lane. Also, Dixon (according to the detectives) then volunteered the news that he (Dixon) had spoken with his lawyer (since 3:30 p.m., presumably), and the lawyer had instructed him to tell the detectives everything. In fact, Scalzo was prepared to take the witness stand at the suppression hearing to indicate that he did not speak to Dixon that afternoon; he demurred when he was advised he might then be disqualified as trial counsel (this, after a prosecution objection in chambers). It is likely academic whether, in fact, Dixon actually talked to Scalzo (or some other lawyer that afternoon), although it is hard to imagine any attorney advising a client in Dixon's circumstances to walk into an interrogation without counsel and simply give a statement to the police. In all actuality, while the Court is satisfied that Dixon made such a claim, the statement was more likely fiction than fact.



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During the thirty minute untapped session (among Dixon, Kulakoski, and Leiter), Kulakoski read Dixon his Miranda rights and warnings, and had Dixon sign the standard written waiver form. (TR 124-7, 197, 209; State's Exhibit 6). Dixon indicated to Kulakoski on a paragraph-by-paragraph basis that he understood the import of the form (although he did not initial each paragraph). Following this, and prior to the taping, Kulakoski then led Dixon through a brief synopsis of what he was going to say on tape. No record exists as to any statements or comments made between 7:30 and 8:00 p.m.

At 8:00 p.m., the tape machine was turned on and Dixon gave a thirty minute statement, which translated to fifteen pages transcribed. The formal statement began with a verbal rehashing of the Miranda rights and warnings, and Dixon reiterated his written waiver from thirty minutes ago. During the taped verbalization of the Miranda warnings, however, no further mention was made of Dixon's earlier comment that he had talked with unnamed counsel and had been encouraged to tell the police what he knew. Kulakoski conceded at hearing that the waiver would have been more persuasive had this been done on tape, and were there more detail concerning actual counsel and the basis of Dixon's purported conversation with him.

The balance of the tape sets forth Dixon's version of the events of September 21st and 22nd, and is inculpatory in the extreme as it involves himself in the earlier assault on Hammer, the restraint of Hammer, the digging of the grave, and finally, the



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forced burial of Hammer while he was still alive. The statement, not surprisingly, places the onus more on Hoffner than on Dixon, but it was and is clearly inculpatory.

The inadmissibility of the initial statement made on November 9, 1993, is virtually conceded by the State. There can be no question but that Dixon, when he made the statement, was both under arrest and in custody; that the statement was elicited in response to interrogation; and that Kulakoski and Snow made a deliberate, strategic decision not to give Dixon his Miranda rights and warnings.

As to the second statement made on November 9, 1993, Dixon first challenges the procedures used in gaining the waiver. He points out that Kulakoski did not have him initial each paragraph of the waiver form as was his custom when advising persons of their Miranda rights. (TR 159-60). Also, Dixon indicates that, although he purportedly signed the waiver form at 7:30 p.m. (as virtually the first order of business at the evening interrogation), the tape recorder was not turned on until 8:00 p.m. (TR 148-9, 156-7, 204-5). Thus, no record exists of the conversation that took place during that half-hour span.

Dixon also argues for suppression on the grounds that his statements were taken in violation of his expressed desire to have counsel present (reading much into the text of the first interrogation on November 9, 1993). Dixon contends that both the statements he made on November 9, 1993, should be suppressed because they were obtained under an intentional plan to violate his





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constitutional rights. Finally, Dixon maintains that suppression is appropriate since the State failed to show that the statements were voluntarily made.

II.

A. Miranda rights

In Miranda v. Arizona, supra, the United States Supreme Court adopted a rule to protect the Fifth Amendment privilege against self-incrimination from the inherently coercive pressures arising during custodial interrogation. The Court held:

> "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.



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> The mere fact that he may have answered some questions or volunteered some statements of his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." Id. at 444-445.

This multifaceted rule has been, for decades, the subject of much litigation involving application of the rule to various factual scenarios, each with a unique twist. All along, however, the consistent premise behind the Miranda rule has been:

> "to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the 'inherently compelling pressures' generated by the custodial setting itself, 'which work to undermine the individual's will to resist,' and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." (Footnotes omitted). Berkemer v. McCarty (1984), 468 U.S. 420, 433-34.

Dixon first contends that all statements he made during his initial November 9th interview must be suppressed because he was subjected to custodial interrogation without the benefit of Miranda warnings. The facts clearly show that Dixon was in custody on November 9, 1993, when he was arrested and taken to the Toledo Police Homicide Office.

Also, the police undeniably interrogated Dixon on that date. "When a statement question or remark by a police officer is reasonably likely to elicit an incriminating response from a suspect, it is an interrogation." State v. Knuckles (1992), 65 Ohio St.3d 494, paragraph two of the syllabus. Snow admits that neither he nor Kulakoski gave Dixon his Miranda warnings prior to



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this midday session at the Safety Building. They determined not to warn Dixon precisely because they feared Dixon, if warned, might not provide them with information as to the disappearance, and as to the forgery. Thus, the decision not to warn was a specific tactic adopted by these detectives in private conference just prior to the interrogation - a tactic adopted in contravention of standard police procedures, in ignorance of thirty years of case law, and in disregard of public policy and concepts of fairness which have embedded Miranda in our national consciousness and conscience. And here it must be stressed that, as to Snow at least, it was a tactic adopted in part because of Dixon's reticence and invocation of his right to counsel on November 4th (Snow, after all knew Dixon was reticent, he knew he had invoked his right to counsel, he knew Dixon had a lawyer, and he even knew the lawyer's name!).

This Court is satisfied that the detective's questioning and comments during this midday session on November 9th were aimed at eliciting some sort of incriminating response. Also, a review of the transcript and the evidence shows that their interrogation of Dixon was reasonably likely to evoke an incriminating response. Indeed, such incriminating responses were elicited as to the forgery charge. The Snow-Kulakoski tactic of deliberately failing to warn under Miranda and the nature of the questioning elicited Dixon's halting narrative in which he describes securing the phony state I.D. card and the sham duplicate auto title, and in which he tells of receiving and spending the proceeds of the fraudulent



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sale. Such an admission, coupled with the evidence already compiled by Scanlon, thus provided a strong circumstantial link to Hammer's disappearance, and stood as a significant prelude to the later, second interrogation of Dixon on November 9th.

In any event, Kulakoski pressed onward in this initial interrogation, telling Dixon that he thought "* * * something else happened to (Hammer);" and then he asked Dixon point blank, "Did you have anything to do with anything that might of [sic] happened to Chris?" (Tr. #1, 15). Finally Kulakoski attempted to elicit an incriminating response from Dixon when he shared the clumsy and ultimately false "bus metaphor" with him. See p.13, ante. When he "got on the bus" a few hours later, it lead inexorably to the most serious criminal charges one can face in this State.

Regardless, it is the conclusion of this Court that this initial midday session on November 9th was a custodial interrogation. The questions and comments of the officers were designed to elicit incriminating information, and they succeeded to some extent in that purpose.

Since the first November 9th session was a custodial interrogation, Dixon was entitled to Miranda warnings before such questioning. See Miranda at 444. Because Dixon was not given the requisite Miranda warnings at any time prior to or during the first November 9th interview, all statements made by him at that interview must be suppressed.

Dixon also contends that all the statements he made on November 9th, including those he made after he was read and waived



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his Miranda rights, must be suppressed because they were taken after he invoked his Miranda right to counsel. Dixon argues that he invoked his right to counsel on two occasions: first, on November 4th when he was questioned by Scanlon and Snow at the Sylvania Township Police Department (TR 28, 45), and second, during the first November 9th interview when he said, "I mean usually like I told you, you can ask this gentleman right here cause (inaudible), I didn't even want to speak with you guys unless I had an attorney present * * *." (Tr. 11 15; TR 137-38).

Under Miranda, "if an individual indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Miranda at 445. Moreover, once a suspect has asserted his or her Miranda right to counsel, not only must the instant interrogation stop, but also the authorities may not approach the suspect for further interrogation until counsel has been made available to him or her. See Edwards v. Arizona (1981), 451 U.S. 477, 484-85 ("an accused, * * * having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication exchanges or conversations with the police"); Minnick v. Mississippi (1990), 498 U.S. 146, 153 ("when counsel is requested, interrogation must cease and officials may not re-initiate interrogation without counsel present, whether or not the accused has consulted with his attorney"). This rule was adopted to prevent police from badgering



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a suspect into waiving his or her previously asserted Miranda rights. Michigan v. Harvey (1990), 494 U.S. 344, 350; McNeil v. Wisconsin (1991), 501 U.S. 171, 177. Despite the existance of these rules, Dixon's November 4th refusal to speak without counsel and his November 9th statements did not legally preclude the police from questioning him further.

Dixon's November 4th refusal to discuss Hammer's disappearance with Scanlon and Snow without his attorney present did not amount to an invocation of his Miranda right to counsel for several reasons. First, on November 4th, Dixon was not "in custody" so as to trigger his Miranda rights. The Miranda Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Footnote omitted). Miranda at 444. In addition, the McNeil Court stated that "[w]e have in fact never held that a person can invoke his Miranda rights anticipatorily in a context other than 'custodial interrogation.'" (Citation omitted). McNeil, supra, at 182, n.3.

The undisputed evidence shows that Dixon was not in custody on November 4th. He appeared at the Sylvania Township Police Department of his own volition and for a reason not associated with Hammer's disappearance. (TR 25-26, 44, 222). The evidence also demonstrates that Scanlon and Snow, when they heard Dixon's name and recognized him as Hammer's roommate, merely invited Dixon to answer some questions about Hammer's disappearance. (TR 25-27, 44). Dixon, while he was being Mirandized, expressed his intent



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not to speak with the detectives without his counsel. Moreover, Dixon was free to leave at any time and, in fact, did leave after deciding not to speak with Scanlon and Snow. (TR 27-28, 45). Since Dixon was not in custody on November 4th, he could not anticipatorily invoke his Miranda right to counsel to preclude police-initiated questioning at a later date. See McNeil, supra, at 182, n.3.

Second, the Edwards and Minnick rules preventing police-initiated questioning of a suspect without the presence of his or her counsel apply only when there is no break in custody between the invocation of the right to counsel and the later questioning. See McNeil at 177; Arizona v. Roberson (1988), 486 U.S. 675 (suspect arrested at burglary scene, Mirandized, invoked right to counsel, and three days later, while still in custody, questioned by officer about a different offense - statements gleaned from later questioning inadmissible, no break in custody). The Eleventh Circuit Court of Appeals stated that:

> "a break in custody dissolves a defendant's Edwards claim. If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why Edwards should bar the admission of any subsequent statements. A break in custody after the invocation of Fifth Amendment rights ends the need for the Edwards rule." Dunkins v. Thigpen (C.A.11, 1988), 854 F.2d 394, 397.

Consequently, even if Dixon was in custody on November 4th, he was subsequently released and had a reasonable opportunity to contact counsel before his November 9th arrest and interrogation.



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This break in custody prevents application of the Edwards and Minnick rules to bar any police-initiated interrogation of Dixon after November 4th. Still it is significant that Snow was witness to Dixon's "invocation," and he heard Dixon mention his lawyer by name. Snow took this knowledge with him into the interrogation room on November 9th, and it played a role in the tactical decision he and Kulakoski made to forego the Miranda warnings.

Similarly, on November 9th, Dixon's somewhat cryptic reference to his prior decision not to speak with Scanlon and Snow without his attorney did not amount to an invocation of his Fifth Amendment right to counsel. Until recently courts have followed three divergent paths in formulating what duty to place upon interrogating police officers when a suspect makes an equivocal or ambiguous request for counsel. See Smith v. Illinois (1984), 469 U.S. 91, 96, n.3. ([1] request for counsel, no matter how ambiguous, precludes further questioning; [2] attempt to establish a threshold standard of clarity for requests which would trigger right to counsel; [3] once suspect mentions counsel, questioning must cease but interrogators may ask narrow questions to clarify suspect's statement and desire for counsel). On June 24, 1994, however, the United States Court of Military Appeals (the United States Supreme Court) clarified the Court's position on the previously divergent approaches to this situation. See Davis v. United States (Jun. 21, 1994), 62 U.S.L.W. 4587. The Davis Court reiterated the Court's prior holding that:



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> "Invocation of the Miranda right to counsel 'requires, at minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' McNeil v. Wisconsin, supra, at 178. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. See ibid." (Emphasis in original.) Davis at 4589.

The Court declined to extend the Edwards rule to require police to cease questioning upon a suspect's ambiguous or equivocal request for counsel, although they did note that it would be "good police practice" for the interviewing officer to clarify whether the suspect actually wants an attorney. Davis at 4589-90. Here was an opportunity for Snow, at least, to employ some good police procedure. He did not.

In light of the Davis decision, however, this Court cannot classify Dixon's oblique reference, made during the first November 9th interview - even with his prior unwillingness to speak with the authorities without an attorney - as a request for counsel. The combination is not sufficiently unequivocal to preclude further police-initiated questioning.

B. Tactics to prevent invocation of Miranda rights

Although the Court finds that Dixon did not invoke his right to counsel on November 9th so as to prevent later police-initiated questioning, it does find merit in Dixon's argument that his November 9th statements must be suppressed because they were



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obtained as a result of a deliberate, bad faith plan on the part of the police to violate his rights. In deciding not to Mirandize Dixon before the first November 9th interview, Detectives Kulakoski and Snow did not necessarily violate Dixon's constitutional rights.[1] The Miranda rights to silence and counsel are not constitutional rights, but prophylactic measures to insure protection of the Fifth Amendment right against compulsory self-incrimination. Oregon v. Elstad (1985), 470 U.S. 298, 305, citing Michigan v. Tucker, (1974), 417 U.S. 433, 444.

The case law is replete with discussions of constitutional violations which require suppression of statements made as a result of such wrongs. The most notable case is Wong Sun v. United States (1963), 371 U.S. 471. The Wong Sun Court suppressed evidence obtained and statements made as a result of an unlawful arrest. Such verbal and physical evidence was excluded as "fruit of the poisonous tree" because it was gleaned by exploitation of the illegality (an unlawful arrest) which violated the suspect's Fourth Amendment right to be free from illegal searches and seizures. Under Wong Sun, suppression would not be warranted if the mechanism revealing the evidence was "sufficiently an act of free will to purge the primary taint." Id. at 486.

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[1] Dixon's Sixth Amendment right to counsel did not attach on November 9th. That right arises when "prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (Quotation omitted). McNeil, supra at 175, quoting United States v. Gouveia (1984), 467 U.S. 180, 188.





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The Wong Sun rule has repeatedly been applied to suppress statements made pursuant to illegal arrests and Fourth Amendment violations.[2] The Court in Tucker, however, indicated that, under the appropriate circumstances, the Wong Sun rationale would be equally applicable in the Fifth Amendment context to violations of the prophylactic Miranda standards. Tucker, supra, at 446-447. The essential rationales for application of the Wong Sun rule in a Fifth Amendment context are twofold. The first objective is deterrence:

> "in a search-and-seizure context, the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' United States v. Calandra, 414 U.S. 338, 347 * * * (1974). * * *
>
> > '"The rule is calculated to prevent, not repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 * * * (1960).' Ibid. [414 U.S. at 347.] * * *.
>
> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or their

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[2] See Brown v. Illinois (1975), 422 U.S. 590 (Miranda warnings alone did not purge the taint of a purposeful illegal arrest); Rawlings v. Kentucky (1980), 448 U.S. 98 (Miranda warnings are an important factor in determining whether statements are tainted by an antecedent illegal arrest).



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> future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (Footnote omitted and emphasis added.) Tucker, supra, at 446-47.

The second objective behind Wong Sun is to protect the courts from reliance on untrustworthy evidence obtained through undue police pressure causing a defendant to accuse himself falsely. Tucker at 448-49. When either of these objectives can be achieved by suppressing the "fruit" of a Miranda violation, then suppression is warranted.

The application of these precepts to the effect of an initial unwarned statement on a later warned statement has produced surprisingly little case law. Perhaps the leading case is Elstad, ante. In that case, two officers of the Polk County Sheriff's Office (Salem, Oregon) went to a private residence with a burglary arrest warrant for young Elstad. Elstad, who lived with his parents, was listening to music in his bedroom when the officers arrived. Young Elstad was told to get dressed, that he was under arrest, and that he was going to be taken to police headquarters. The young man was brought to the living room, but prior to departure, Officer McAllister asked the mother to step into the kitchen, where he briefly explained the situation. As he was doing this, Officer Burke sat with young Elstad in the living room. Burke asked Elstad if he knew why the officers were there. Elstad replied "no", he had no idea. Burke then said, "do you know a person named Gross," to which Elstad said, "yes", indicating he



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understood there had been a robbery at the Gross residence. Burke then said that he felt Elstad was involved in that incident. Young Elstad then said, "yes, I was there." Later, at the Sheriff's Office, Elstad was read his Miranda rights. He waived those rights, signed a written waiver, and made a full statement, admitting the burglary.

The trial court denied Elstad's motion to suppress. the Oregon Court of Appeals reversed and, in turn, was reversed by the U.S. Supreme Court. In doing so, the Supreme Court in Elstad agreed with the Tucker Court's reasoning that either the objective of deterrence or trustworthiness must be met to apply the rule of Wong Sun to a Miranda violation. The Elstad Court noted that "the absence of coercion or improper tactics undercuts the twin rationales - trustworthiness and deterrence - for a broader rule" requiring suppression of statements made after a reading and waiver of Miranda rights. Elstad at 308. The Elstad Court, thus, concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." (Emphasis added.) Id. at 314. In applying the Tucker rationale, the Court reasoned:

> "If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine



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> the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility should turn in these circumstances solely on whether it is knowingly and voluntarily made." (Emphasis added.) Id. at 309.

The Tucker and Elstad courts declined to apply the Wong Sun rule because each of those cases involved no purposeful conduct on the part of the authorities to deprive the suspects in each case of their rights. Specifically, the Tucker case involved an attempt to suppress statements of a third party whose name was obtained from the suspect after he was incompletely advised of his rights. The Court found that the third party's statements could not be suppressed as "fruits" of the authorities' failure to properly apprise the suspect of his rights. The Elstad case similarly involved no purposeful conduct on the part of the police. In Elstad, the suspect attempted to suppress statements made after a complete reading and waiver of his Miranda rights, because he previously made inculpatory statements without the benefit of Miranda warnings. He claimed that the latter statements were the "fruit" of his prior admissions which were obtained in violation of his Miranda rights. Again, in Elstad, as in Tucker, the Court declined to exclude the latter statements because the police exercised no improper tactics in obtaining the statements from the suspect. As such, the twin Wong Sun rationales of deterrence and trustworthiness would not be served by exclusion of the statements



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obtained after full Miranda warnings and a valid waiver.

But the facts in Elstad differ markedly from the facts of this case. Officer Burke should not have spoken to young Elstad about anything having to do with the alleged burglary, without Miranda warnings and waiver. Clearly, Elstad was under arrest. Yet, it is equally clear that Officer Burke's brief conversation with Elstad - as they waited for Officer McAllister - was not part of a deliberate, tactical plan by the Oregon officers. Indeed, his questions were introductory in nature. While sufficiently improper to exclude Elstad's unwarned admission at the house, the Supreme Court properly found that the warned statement at headquarters, (an hour or more later), was not tainted. Burke's questions at the house were ill-advised but were inadvertent. In any event, Burke's questions did not amount to deliberate police misconduct.

In this case, however, the decision of Kulakoski and Snow to dispense with Miranda warnings was deliberate and tactical. They did so because they feared the warnings would prompt Dixon to refuse to talk and invoke his right to counsel. In making this deliberate and tactical decision, one of the detectives (i.e., Snow), had very recently seen Dixon refuse to talk; and, that same officer not only knew Dixon had a lawyer, he knew the lawyer's name. Moreover, it is beyond cavil that both Kulakoski and Snow knew Dixon was in custody and under arrest, as they had helped serve the arrest warrant earlier that morning. Thus, this Court finds the actions of Kulakoski and Snow (in deliberately failing to administer the Miranda warnings prior to the midday interrogation)



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were tactical and willful. This court also finds those actions to have been egregious, and a gross departure from accepted police procedure. Their actions worked to render the Miranda protections a nullity.

There are two other cases with facts somewhat similar to the case now under review which this Court finds helpful to this analysis. See United States v. Carter (C.A.8, 1989), 884 F.2d 368; United States v. Anderson (E.D.N.Y.1990), 752 F.Supp. 565, affirmed (C.A.2, 1991), 929 F.2d 96. Applying the reasoning of Elstad, these two courts determined that suppression was warranted even though the authorities had read the suspects their Miranda rights and obtained a waiver of those rights. The Carter court suppressed statements made by a suspect directly on the heels of unwarned statements. See Carter at 373. The Anderson court suppressed statements that were preceded by Miranda warnings, accompanied by legal distortions that "made a mockery of the safeguards provided by Miranda." Anderson, 752 F.Supp. at 567.

The Carter court recognized the Elstad Court's distinction between "coercion resulting from the absence of Miranda warnings [and] actual coercion through the use of coercive or improper methods by the police." (Emphasis added.) Carter at 372. The Carter court noted that:

> "statements obtained in violation of Miranda, although they must be suppressed as presumptively coercive, may yet be deemed voluntary in fact. [Elstad] at 307 * * *. If the unwarned statement is voluntary, then a subsequent warned confession may be admissible if the prior statement is not the result of





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> 'deliberately coercive or improper tactics.' Id. at 314 * * *. Of course, the second statement must be voluntary as well before it may be admitted. Id. at 318 * * *." Carter at 372-73.

In other words, when a purposeful Miranda violation occurs, a subsequent warned statement is inadmissible even if it was voluntarily made. As such, if the first statements are the product of improper police tactics, then the court does not reach the voluntariness inquiry with respect to the latter statements. If the first unwarned statements were voluntary, however, then the court is charged with examining "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." See Elstad at 318; Carter at 373. The Carter court further noted the practicality of this rule in view of its support of Miranda's bright-line qualities:

> "If the police are permitted * * * to ignore Miranda until after they obtain a confession, the courts will once again be embroiled in the endless case-by-case voluntariness inquiries Miranda was designed to prevent, and the ease-of-application rationale enunciated by the Supreme Court will be largely nullified." Carter at 374.

See, also, Berkemer, supra, at 433-34.

In the case sub judice, the statements obtained from Dixon were not elicited as a result of police error. Dixon was unmistakably under arrest when Detectives Kulakoski and Snow deliberately decided not to advise him of his Miranda rights. Moreover, Kulakosi and Snow admitted that their conduct was



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calculated to undermine Dixon's will to refuse to speak with them without his attorney. (TR 117, 238). They purposefully decided not to advise Dixon of his Miranda rights because they thought he would not be cooperative in answering their questions. Also, in deciding not to Mirandize Dixon, the detectives willfully violated the policies of the Toledo Police Detective Bureau. (TR 134-35). This conduct plainly violated Dixon's Miranda rights and was aimed at depriving Dixon of his Fifth Amendment right against compelled self-incrimination.[3]

Under certain circumstances the primary taint of a coerced statement may be purged:

> In deciding whether a second confession has been tainted by [a] prior coerced statement, 'the time that passes between confessions, the change in place of interrogation, and the change in identity of interrogators all bear on whether the coercion has carried over into the second confession." Elstad 470 U.S. at 310* * *. Further, we must look at the 'twin rationales - trustworthiness and deterrence." [Id. at 308.]" Anderson, 929 F.2d at 102.

This Court, however, finds the circumstances in this case insufficient to dissipate the taint associated with the initial November 9th interrogation. In particular, no more than four hours passed between Dixon's initial improperly obtained confession to forgery of Hammer's auto title and Dixon's subsequent admission to involvement in Hammer's murder. Moreover, during that time Dixon was incarcerated in the Lucas County Correction Center. Finally,

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[3]The Court finds not only that the statements made by Dixon at the midday November 9th interrogation were the product of improper police tactics, but also that they were involuntarily made. See post at 38.



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when the interrogation of Dixon resumed, it was spearheaded by the same officer who had conducted most of the initial interrogation (i.e., Kulakoski); and it was conducted in the same location (i.e., police headquarters). These circumstances fail to purge the taint of Kulakoski's and Snow's wrongful conduct.

In light of the willful nature of the official misconduct in this case, the twin rationales of deterrence and trustworthiness are well-served by suppressing both of Dixon's November 9th statements. Suppression of even the statements preceded by Miranda warnings deters police from embarking on a course of conduct aimed at avoiding a suspect's invocation of his or her Miranda right to counsel, thereby precluding further interrogation absent the suspect's attorney. For example, if the detectives had commenced Dixon's first November 9th interview by reading him his Miranda rights, then arguably he might have invoked his right to counsel and prevented Kulakoski and Snow from questioning him further without his attorney. This is precisely what Snow, at least, anticipated since, on November 4th, Dixon declined to discuss Hammer's disappearance without attorney Scalzo. If Dixon had invoked his right to counsel, then the detectives would have missed the opportunity of interrogating Dixon for four hours, and they would not have obtained the comments implicating him in the forgery.

In addition, complete suppression of Dixon's November 9th statements advances the spirit of Miranda by bolstering the trustworthiness of statements obtained through custodial



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interrogation. This purpose is achieved by preventing the police from delaying Mirandizing a suspect until they interrogate that individual for a time sufficient to wear down his or her will. By eliminating such delays, it also diminishes the risk of a suspect falsely incriminating himself or herself simply to end the interrogation.

Finally, the Miranda goal of avoiding a case-by-case voluntariness determination is avoided by suppressing both Dixon's November 9th statements. For these reasons, Dixon's motion to suppress is granted.

C. Voluntariness

In general, the voluntariness of a confession is evaluated on the "totality of all the surrounding circumstances, including the accused's characteristics, the conditions of the interrogation, and the conduct of the law enforcement officials". Anderson, 929 F.2d at 99. It is the prosecution's burden to prove the voluntariness of a confession by a preponderance of the evidence. Id. Based on the totality of the circumstances in this case, including: Kulakoski's and Snow's deliberate decision to persistently interrogate Dixon for four hours, while under arrest and in an inherently coercive police atmosphere, without giving him his Miranda rights; Kulakoski's employment of his self-designed, factually and legally erroneous bus analogy; the scant record of the interrogation; and the State's failure to demonstrate that



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Dixon's knowledge of the criminal justice system enabled him to independently ascertain his rights and the true consequences of "getting on the bus"; the Court finds that the statements made by Dixon during the midday November 9th interrogation were involuntarily made.

Because the Court finds that all Dixon's November 9th statements were the product of improper police tactics, the presumption of compulsion cannot be overcome by the mere reading and waiver of his Miranda rights. As such, the egregious and purposeful disregard of Dixon's Miranda rights prevents the Court from undertaking a voluntariness inquiry with respect to the statements Dixon made during the second November 9th interview. See Carter, supra, at 372-73.

## III. AFTERWORD

It is not an easy decision to suppress a warned confession in a highly publicized aggravated murder case. This is especially so when the alleged facts describe an alleged crime that is heinous in its planning and execution. But, the body of cases following Miranda remains not only good law, but good public policy. Here, the detectives' failure to follow that law and policy was deliberate, tactical and egregious. The only meaningful way of condemning such tactics, and deterring similar misconduct in the future is to exclude the statement.

It is ironic that the impact of this ruling will likely inure





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more to Hoffner's benefit than Dixon's, because if upheld, the State may have to negotiate with Hoffner for his testimony. Obviously, though, this will abide the decision of the Court of Appeals.

Looking back at the events of November 9th, it is clear that Kulakoski and Snow hoped Dixon would admit not only the forgery, but also a role in Christopher Hammer's disappearance during the midday interrogation of November 9th. In this regard, it is ironic to note that this decision would have been alot shorter and the result more inimical to the State's case had they succeeded, because, then the murder confession would have been a direct and immediate result of the willful failure to inform. And, such a result would have led to a virtually unquestioned suppression of the statement. What has emerged is a much more detailed analysis of a relatively and surprisingly sparse body of case law analyzing factual distinctions among cases when there is an earlier unwarned statement followed by a warned statement.

JOURNAL ENTRY

It is ORDERED that defendant Archie J. Dixon's motion to suppress the statements he made during custodial interrogation on November 9, 1993 is GRANTED.

August 2, 1994

William J. Skow, Judge



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# REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 1 - 2011
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No. 10-1540

In the Supreme Court of the United States

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DAVID BOBBY, Warden,

*Petitioner,*

v.

ARCHIE DIXON,

*Respondent.*

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

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## REPLY OF THE PETITIONER

At an evening police interview on November 9, 1993, Archie Dixon received two warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), signed a waiver, and affirmed that he was acting of "his own free will." App. 127a. He then confessed to murdering Chris Hammer. Although police improperly withheld *Miranda* warnings to Dixon at an encounter earlier that day, the Ohio Supreme Court determined that Dixon's statement at the evening interview was voluntary and admissible under *Oregon v. Elstad*, 470 U.S. 298 (1985).

According to Dixon, the Sixth Circuit's judgment below—condemning the Ohio Supreme Court's analysis and granting habeas relief—"fully comports" with this Court's decisions. Opp'n at 8. He is wrong. The Sixth Circuit ignored *Miranda*'s "custody" requirement, incorporated a novel state-of-mind inquiry into *Elstad*, and denounced a common method of police questioning. Dixon offers no defense of these actions; he simply parrots the Sixth Circuit's analysis and proclaims its fidelity to precedent.

Given the gravity of the errors and the number of conflicts created by the decision below, the Court should grant certiorari.

### A. The facts are not in dispute; the law is.

Throughout his Opposition, Dixon embraces the state trial court's opinion. To be clear, the Warden does not quibble with the trial court's factual recitation, which matches the Ohio Supreme Court's. The Warden disputes the trial court's *legal analysis* and the Sixth Circuit's decision adopting it.

As to the facts, the state trial court offered a fair summary. During a visit to an impound lot on November 4, 1993, Dixon encountered two detectives who sought to question him about Hammer's disappearance. "Dixon was not in custody, and not under arrest" at the time, and he "departed . . . without answering questions." Trial Ct. Op. at 6 (attached to Opp'n).

On November 9, police arrested Dixon for auto title forgery. Detectives questioned him between 11:30 a.m. and 3:30 p.m., but the actual interview was much shorter because "there were frequent breaks." *Id.* at 10. Although Dixon was in custody, detectives made the "conscious choice not to *Mirandize* [him]." *Id.* at 11. Responding to their questions, Dixon confessed to selling a car "by means of a false State I.D. card and a false duplicate title," *id.*, but he insisted that he had "[n]othing whatsoever" to do with Hammer's disappearance.[1] App. 186a.

After locating Hammer's dead body, detectives brought Dixon back to the station at 7:30 p.m. for a second interview. Dixon (1) inquired if police had "dug up a body," (2) asked "whether Hoffner was in custody," and (3) indicated that he would "tell the detectives everything." Trial Ct. Op. at 15.

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[1] At this first session, Dixon says he expressed a "clear statement that he had already requested a lawyer." Opp'n at 10. That is inaccurate. As the state trial court observed, Dixon made a "cryptic reference" to an attorney, but his words "did not amount to an invocation of his Fifth Amendment right to counsel." Trial Ct. Op. at 25 (citing *Davis v. United States*, 512 U.S. 452 (1994)).

Detectives then "read Dixon his *Miranda* rights and warnings, and had Dixon sign the standard written waiver form." *Id.* at 16.

Detectives spoke with Dixon "between 7:30 and 8:00 p.m.," but "[n]o record exists as to [their] statements or comments." *Id.* At 8:00 p.m., detectives started a recording device.[2] They "began with a verbal rehashing of the *Miranda* rights and warnings, and Dixon reiterated his written waiver." *Id.* Dixon then confessed to murdering Hammer with his accomplice, Timothy Hoffner.

Although this recitation is largely accurate, the trial court's legal analysis was off the mark.

Due to the absence of *Miranda* warnings, the trial court properly suppressed Dixon's statements at the first November 9 interview. Trial Ct. Op. at 21. But the court went further. It held that the *Miranda* error at the first interview tainted the second interview and, with it, Dixon's murder confession.

The trial court rejected the State's invocation of *Oregon v. Elstad*, 470 U.S. 298 (1985), because that case "involved no purposeful conduct on the part of the police." *Id.* at 31. Instead, the court imported a fruit-of-the-poisonous-tree analysis from *Wong Sun v. United States*, 371 U.S. 471 (1963): "When a purposeful *Miranda* violation occurs, the court said, "a subsequent warned statement is inadmissible even if it was voluntarily made." *Id.* at 34.

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[2] Regarding this second session, Dixon claims that "[o]nly after getting incriminating statements from [him] did the police turn on the tape recorder and give basic *Miranda* warnings." Opp'n at 10. Not so. Dixon signed a *Miranda* waiver *at 7:30 p.m.*, at the very start of this interview. See App. 189a.

By contrast, the Warden argues—and the Ohio court of appeals, the Ohio Supreme Court, the federal district court, and Judge Siler's dissent below agreed—that the detectives' state of mind on November 9 is irrelevant. So long as Dixon's confession at the second (warned) interview was voluntary, it was admissible under *Elstad*.

This dispute forms the core of the Warden's petition for certiorari.

### B. The Sixth Circuit ignored the "custody" requirement of *Miranda*.

The Sixth Circuit identified "three clear constitutional errors" in the Ohio Supreme Court's decision approving the admissibility of Dixon's confession. App. 12a.

The court first highlighted Dixon's exchange at the impound lot on November 4: "Dixon had made it completely clear to the police that he did not want to talk to detectives without a lawyer present." App. 10a. According to the Sixth Circuit, this encounter triggered "the bright-line rule of *Miranda* against further interrogation," rendering Dixon's confession on November 9 inadmissible. App. 11a.

This is a patent misapplication of *Miranda*. To trigger "the bright-line rule" against further interrogation," the suspect must invoke his rights "in the context of custodial interrogation." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2090 (2009). Because Dixon was not in custody on November 4, he could not "invoke his *Miranda* rights anticipatorily" to prohibit police questioning on a later date. *McNeil v. Wisconsin*, 501 U.S.171, 182 n.3 (1991).

Dixon criticizes the Warden for discussing *Edwards v. Arizona*, 451 U.S. 477 (1981), in his petition. Although the Sixth Circuit's opinion cited *Edwards*, Dixon says that the court relied entirely "upon fundamental principles of *Miranda*." Opp'n at 8.

Even if one accepts that dubious claim, the Sixth Circuit still misconstrued *Miranda*'s "fundamental principles." The decision protects "an individual . . . subjected to *custodial* police interrogation." *Miranda*, 384 U.S. at 439 (emphasis added). Dixon does not—and cannot—defend the Sixth Circuit's extension of *Miranda* to the non-custodial setting.

### C. The Sixth Circuit improperly evaluated the detectives' state of mind.

The Sixth Circuit found Dixon's confession inadmissible for a second reason: The detectives' "deliberate, planned refusal to warn" Dixon of his *Miranda* rights at the first session on November 9 tainted the second session in which he confessed to murder. App. 12a.

Dixon asserts that "the Circuit was correct to consider the deliberate nature of the violation." Opp'n at 9. That is wrong.

#### 1. The interviewer's state of mind is irrelevant to the *Elstad* inquiry.

In *Elstad*, the Court outlined the inquiry for determining when "an initial failure of law enforcement to administer the warnings required by *Miranda* . . . 'taints' subsequent admissions made after a suspect has been fully advised of and has

waived his *Miranda* rights." 470 U.S. at 300. The analysis turns on "voluntariness." A court first asks whether the suspect's initial statement, "though technically in violation of *Miranda*, was voluntary." *Id.* at 318. It then determines "whether . . . the second [warned] statement was also voluntarily made." *Id.* If the suspect spoke voluntarily on both occasions, "[n]o . . . purpose is served by imputing 'taint' [from the unwarned statement] to subsequent statements." *Id. see also id.* at 305-08 (rejecting the *Wong Sun* fruits doctrine for analyzing the admissibility of a subsequent warned confession following an initial failure to warn).

The "voluntariness" inquiry examines "the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). But the police officer's state of mind "is irrelevant to the question of . . . voluntariness." *Moran v. Burbine*, 475 U.S. 412, 423 (1986). Just last term, this Court emphasized that "an officer's purely internal thoughts *have no conceivable effect* on how a reasonable person in the suspect's position would understand his freedom of action." *J.D.B. v. North Carolina*, 180 L.Ed.2d 310, 326 n.8. (2011) (emphasis added).

The facts are clear: Detectives deliberately withheld *Miranda* warnings at the first meeting on November 9. But the law is equally clear: The detectives' state of mind is irrelevant to an assessment of whether Dixon's confession at the second November 9 meeting was voluntary or coerced. The Ohio Supreme Court correctly discounted this evidence in its *Elstad* analysis. See App. 124a ("Dixon has failed to explain how the

detectives' subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent.").

### 2. Dixon offers no support for his contrary reading of *Elstad*.

Taking the opposite view, Dixon says that the touchstone of *Elstad* is "whether the violation of *Miranda* was deliberate or not," and courts should apply the voluntariness test in only those cases that involve a *Miranda* "oversight." Opp'n at 9.

Not so. The *Elstad* framework governs all violations of *Miranda*, "[w]hatever the reason." *Elstad*, 470 U.S. at 316. Indeed, the *Elstad* Court expressed clear disinterest in the explanation behind the officer's failure to issue *Miranda* warnings in that case: The violation could have been inadvertent—he was "confus[ed] as to whether the brief exchange qualified as 'custodial interrogation.'" *Id.* at 315. Or the violation could have been intentional—the officer was "reluctan[t] to initiate an alarming police procedure." *Id.* In both instances, the voluntariness inquiry applies with equal force.

Invoking *Missouri v. Seibert*, 542 U.S. 600 (2004), Dixon argues that *Elstad* is "limited . . . to 'arguably innocent neglect of *Miranda*.'" Opp'n at 9. But he mistakenly quotes the plurality opinion to advance that proposition.

Justice Kennedy's concurrence is the controlling opinion in *Seibert*. See *Marks v. United States*, 430 U.S. 188, 193 (1977). And his concurrence makes clear that a "deliberate violation of *Miranda*" is not enough to remove a case from the *Elstad* framework. *Seibert*, 542 U.S. at 620. *Elstad* becomes

inapplicable only when officers deliberately recite *Miranda* warnings "midinterrogation, after inculpatory statements have already been obtained." *Id.*

Detectives did not use that technique on Dixon—they did not elicit incriminating statements about Hammer's murder, recite *Miranda* warnings, and then re-elicit those same incriminating statements. The *Elstad* voluntariness test therefore applies, and the deliberate nature of the detectives' violation is irrelevant. The Sixth Circuit was wrong to hold otherwise.

Contrary to Dixon's assertions (Opp'n at 9), the decision below creates deep divisions in lower court authority. Other circuits apply *Elstad* as "the general rule," *United States v. Street*, 472 F.3d 1298, 1312 (11th Cir. 2006), and they invoke *Seibert*'s "presumptive rule of exclusion" in the rare case where police "intentionally withh[old]" *Miranda* warnings "until after the suspect confesses," *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004). The Sixth Circuit turned that framework on its head: *Elstad* is the exception, applying only to "momentary, innocent failure[s] to warn." App. 12a. A broad theory of exclusion—essentially, a fruit-of-the-poisonous-tree rule—governs all other cases

The Court should resolve this disagreement.

### D. The Sixth Circuit denounced a long-sanctioned interview tactic.

Dixon embraces the Sixth Circuit's third holding: the Ohio Supreme Court's voluntariness finding "was based on an unreasonable determination of facts." App. 13a.

The Ohio Supreme Court reviewed every aspect of the November 9 interviews: their length and location; Dixon's age, education, and familiarity with the criminal justice system; the absence of physical coercion or threats; and Dixon's verbal responses to detectives. Balancing this evidence, the court determined that Dixon's statements at both sessions were voluntary. Therefore, his confession at the second (warned) session was admissible under *Elstad*. See App. 121a-128a.

Both the district court and the dissenting judge below characterized this finding as "reasonable," and they were right.

Dixon offers two meager responses: First, he trumpets the opinion of the state trial court, which 'decid[ed] that Mr. Dixon's statement was involuntary." Opp'n at 11 (citing Trial Ct. Op. at 37-38). That reliance is misplaced. On habeas review, federal courts examine "the last state court to issue a reasoned opinion." *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005). Under 28 U.S.C. § 2254(d), the question is not whether the Ohio Supreme Court performed a better analysis than the trial court, but only whether its analysis is "reasonable."

The Ohio Supreme Court's analysis is both reasonable and better than the state trial court's. It examined the same interview recordings and transcripts. But unlike the trial court, the Ohio Supreme Court applied the correct legal standard. Whereas the trial court relied on the detectives' 'deliberate decision" to withhold *Miranda* warnings, see Trial Ct. Op. at 37, the Ohio Supreme Court properly dismissed that state-of-mind evidence as

irrelevant to the question whether Dixon spoke voluntarily. See App. 124a.

Next, Dixon condemns the detectives' "get on the bus" admonition in the first November 9 interview as an "inherently coercive tactic." Opp'n at 12. Yet he commits the same mistakes as the Sixth Circuit.[3]

Dixon was entirely unphased by the "bus" comment: "That's no problem," "I told you everything I know," and "All I know is that [Hammer] said he was going to Tennessee." App. 183a, 186a. These are hardly the responses of an individual bullied into a confession. (Dixon only confessed four hours later, after he learned that police had located a body and spoke to Hoffner, and after police issued two *Miranda* warnings.)

Moreover, the "bus" comment is simply a variant of the "prisoner's dilemma." Harboring suspicions that two individuals committed a crime, police offer favorable treatment to the one who cooperates first. Neither this Court nor any other court has condemned this interview practice. See *Elstad*, 470 U.S. at 317 (refusing "to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily"). To the contrary, courts have deemed it "constitutional." *United States v. Maddox*, 48 F.3d 791, 796 (4th Cir. 1995); accord *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978).

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[3] Dixon also mischaracterizes the statement as an ultimatum to "confess" or "get the electric chair." When detectives made the comment, this was a missing persons case. Given that fact, it is inconceivable that detectives were threatening a death sentence unless Dixon confessed to murder.

The Ohio Supreme Court's *Elstad* analysis flagged all the signs of voluntariness: Dixon twice "waived his rights," he indicated that he was acting "of his own free will," he affirmed that "no deals or promises had been made," he "remained calm and collected," and "there was no evidence of mistreatment." App. 127a. To overturn that reasonable judgment, the Sixth Circuit took two impermissible steps—it ignored the dictates of 28 U.S.C. § 2254 and it barred a common method of police questioning.

### E. Dixon's remaining arguments misstate the record and the law.

Dixon attempts to defeat the Warden's petition with two other arguments—both frivolous.

First, Dixon claims that "the Ohio Supreme Court improperly imposed the burden on [him] to prove that his confession was coerced." Opp'n at 12. To the contrary, the Ohio Supreme Court made clear that "*the state* carrie[d] the burden of proving voluntariness by a preponderance of the evidence." App. 124a (emphasis added). The court even referenced the leading federal case—*Colorado v. Connelly*, 479 U.S. 157 (1986)—for that rule. *Id.*

Second, Dixon contends that the Anti-Terrorism and Effective Death Penalty Act (AEDPA) "does not apply" because the Ohio Supreme Court "did not, and could not, apply *Seibert*" on direct appeal. Opp'n at 14-15. All four federal judges assigned to this case rejected that proposition. And for good reason: AEDPA governs any claim "adjudicated on the merits in State court." 28 U.S.C. § 2254(d). Because

the Ohio Supreme Court adjudicated Dixon's *Miranda* claim "on the merits," AEDPA applies.

To be sure, an open question exists on whether *Seibert* qualifies as "clearly established Federal law" under AEDPA in this case. The Ohio Supreme Court rejected Dixon's appeal in April 2004. While his petition for certiorari was pending, this Court issued *Seibert*. Because the Ohio Supreme Court did not have the benefit of *Seibert*, it is unclear whether a federal court can apply that decision on habeas review. (The Court will resolve this question shortly in *Greene v. Fisher*, No. 10-637.)

But the question is academic. Even if *Seibert* supplies "clearly established law" for this case, Dixon cannot show that the Ohio Supreme Court's decision was "contrary to" or an "unreasonable application of" *Seibert*.[4] 28 U.S.C. § 2254(d)(1). As explained above, Justice Kennedy's controlling opinion establishes a presumptive rule of exclusion when police deliberately elicit a confession, recite *Miranda* warnings, and then re-elicit the same confession. Because the detectives did not use that technique on Dixon, this case is "governed by the principles of *Elstad*." *Seibert*, 542 U.S at 622.

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[4] Dixon is also not "entitled to de novo review" because the Ohio Supreme Court's opinion failed "to address the impact of *Seibert*." Opp'n at 15. AEDPA "does not require citation of [this Court's] cases—indeed, it does not even require *awareness* of [those] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).

* * *

Because detectives violated *Miranda* at the first November 9 interview, the Ohio courts properly suppressed Dixon's statements from that session. But extending that remedy to the second November 9 interview (where detectives issued two *Miranda* warnings) was wrong: The Sixth Circuit ignored this Court's precedents, parted company with its sister circuits, and denounced well-worn police interviewing techniques. Errors of such magnitude warrant certiorari.

## CONCLUSION

The Court should grant the Warden's petition.

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